A **PATHMANATHAN KRISHNAN v. INDIRA GANDHI MUTHO & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
HAMID SULTAN ABU BACKER JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEALS NO: A-02-1826-08-2013; A-01-304-08-2013 & A-01-316-09-2013]
30 DECEMBER 2015
[2016] CLJ JT(1)

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ADMINISTRATIVE LAW: *Judicial review – Jurisdiction – Conversion of non-Muslim children to religion of Islam – Whether within exclusive jurisdiction of Shariah Court – Certificates of Conversion – Certificates issued by Islamic religious authorities – Whether an administrative decision – Whether amenable to judicial*
D *review – Whether conversion lawful and constitutional – Federal Constitution, arts. 3, 5, 8, 11, 12 – Administration of the Religion of Islam (Perak) Enactment 2004, ss. 96, 101, 106*

ADMINISTRATIVE LAW: *Judicial review – Jurisdiction – Conversion of non-Muslim children to religion of Islam – Application for review of decisions of Islamic*
E *religious authorities – Principles – Issues before High Court – Whether only that of legality of conversion process – Whether High Court decided on legality of conversion instead – Whether a misdirection*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to practice one's religion – Conversion of non-Muslim children to religion of Islam – Conversion at*
F *instance of a converting parent – Whether single parent could lawfully convert children to Islam – Whether requiring consent of both parents – Whether conversion contravened fundamental liberties provisions of Constitution – Whether conversion lawful and constitutional – Federal Constitution, arts. 3, 5, 8, 11, 12*

G ***ISLAMIC LAW:*** *Convert – Conversion to Islam – Conversion of non-Muslim children to religion of Islam – Jurisdiction – Whether within exclusive jurisdiction of Shariah Court – Certificates of Conversion – Whether conclusive proof of facts stated therein – Judicial review – Whether matter could properly be heard by civil High Court – Whether single parent could convert children to Islam – Whether conversion lawful and constitutional – Federal Constitution, arts. 3, 5, 8, 11, 12 –*
H *Administration of the Religion of Islam (Perak) Enactment 2004, ss. 96, 101, 106*

These appeals were against the decision of the learned Judicial Commissioner ('JC') ruling, in a judicial review proceeding before him, that the conversion to the religion of Islam of the children of the appellant and
I respondent in the first appeal was unlawful, unconstitutional, null and void and of no effect. The facts were that the appellant and the respondent were married in 1993 under the Law Reform (Marriage and Divorce) Act 1976. In 2009, the appellant converted to Islam and thereafter successfully applied

to the Jabatan Agama Islam, Perak to also convert their three children, aged 12, 11 and 11 months respectively. It was not in dispute that three Certificates of Conversion ('Certificates') certifying the children's conversion to Islam were issued by the Pengarah Jabatan Agama Islam ('Pengarah') and/or the Pendaftar Muallaf, Perak, and that, upon the appellant's application, a permanent custody order over the children was also granted to the appellant by the Shariah Court. It was the view of the learned JC, in allowing the respondent's judicial review application, and quashing the conversion and decisions of the Pengarah and Pendaftar Muallaf, that: (i) the matter before him had boiled down to a constitutional issue, thereby depriving the Shariah Court of jurisdiction to decide on the matter; (ii) the conversion had contravened the constitutional liberties provisions in the Federal Constitution ('Constitution'), particularly arts. 3, 5, 8 and 11 thereof; (iii) the rules of natural justice had been trampled as there was a complete failure by the Pengarah, or the Pendaftar Muallaf or the Shariah Court to hear the respondent or the children; (iv) sections 96 and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004 ('Enactment') had been transgressed, since, upon conversion, no Affirmation of Faith had been administered on the children, and no consent in writing had been obtained from the parent; and (v) the conversion without the consent of the non-converting parent and the children had violated international norms and conventions.

In taking their appeals before the learned justices of appeal herein, the appellants, collectively and separately, and in essence, retorted, firstly, that the learned JC had no jurisdiction to determine the issue of the children's conversion to Islam as jurisdiction thereof lay exclusively with the Shariah Court; secondly, that the learned JC had committed a grave error when he approached the jurisdiction issue by venturing into the constitutional construct of the fundamental liberties provisions of the Constitution; and thirdly, that the conversion of the children had neither contravened the Enactment nor the Constitution.

Held (allowing appeal; ruling that conversion was effected in accordance with the law)
Per Balia Yusof Wahi JCA (for the majority):

(1) The eldest child has attained the age of majority at the time of the hearing of the appeals and is able to choose her own religion. The issue of her conversion has therefore become academic and no order will be made in respect of her conversion. (paras 26 & 27)

(2) Upon consideration of the decided cases and applying the 'subject matter approach', it is beyond doubt that the issue of the validity of the conversion of any person to the religion of Islam, and hence whether a person is a Muslim or not, is a matter falling under the exclusive jurisdiction of the Shariah Court. It is also clear, upon a plain reading of s. 50 of the Enactment, that the power to declare the status of a

A Muslim person is within the exclusive jurisdiction of the Shariah High Court. The learned JC, in declaring the conversion null and void, had violated the provision of s. 50(3)(b)(x) of the Enactment. The learned JC erred on the very first issue of jurisdiction which was taken by way of a preliminary objection in the judicial review proceedings before him. B (paras 33-38)

(3) The learned JC had approached the subject matter before him erroneously when he ventured into the constitutional construct of the fundamental liberties provisions of the Constitution. The hearing before him was simply on the constitutionality of the conversion process which C was challenged by way of a judicial review application. His Lordship instead had decided on the constitutionality of the conversion. On this ground alone, the judgment of the High Court ought to be set aside. To allow the High Court to review decisions of matters which are within the exclusive province of the Shariah Court would contravene art. 121 D of the Constitution and is inconsistent with the principles of judicial review. (paras 40-43)

(4) In interpreting ss. 96 and 106 of the Enactment and declaring the Certificates null and void, and further declaring that the children had not been lawfully converted to the religion of Islam, the learned JC had E overlooked and failed to consider the provision of s. 101 of the said Enactment, in particular sub-s. (2) thereof, which declares that the Certificate of Conversion is conclusive proof of the facts stated therein. In the absence of any evidence to the contrary, or any challenge to the Certificates, which must be taken in the Shariah Court, the Certificates F must remain good. (para 51)

(4a) The Perakuan Memeluk Islam (the Certificates) which states that the persons named therein has been registered in the Register of Muallaf shows that the process of conversion must have been done to the satisfaction of the Registrar of Muallaf. The Perakuan states that the G person named therein 'adalah disahkan telah memeluk Islam' and 'surat ini membuktikan bahawa beliau adalah seorang Islam mengikut rekod jabatan ini'. The High Court has to accept the facts as so stated and it is beyond the powers of the learned JC to question the same. On the same token, it is not the business of the learned JC to consider whether H the provisions of ss. 96 and 106 of the Enactment had been violated. To dwell into that issue is to transgress into the issue of the validity of the conversion which jurisdiction he had not. Thus, the pronouncement by the learned JC on the non-compliance of the two provisions of the Enactment was a misdirection. (paras 55, 56 & 57)

I **(5)** The learned JC had further erred in finding that art. 11 of the Constitution had been violated. In holding that art. 11 has been violated because the respondent had been deprived of the opportunity to teach her children the tenets of her religion, the learned JC had run foul of the

pronouncement made by the Federal Court in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* that art. 12(4) of the Constitution does not confer the right of choice of religion of children under the age of 18 in both parents. The exercise of the right of one parent under art. 12(4) cannot and shall not be taken to mean a deprivation of another parent's right to profess and practice his or her religion or to propagate it under art. 11(1) of the Constitution. (paras 62 & 63)

(6) The approach taken by the learned JC in imposing upon himself the burden of sticking very closely to the standard of international norms in interpreting the Constitution is not in tandem with the accepted principles of constitutional interpretation. International treaties do not form part of our law unless the provisions were incorporated into our laws, and for such treaties to be operative in Malaysia, Parliament must legislate. For us, the Constitution is supreme and we are duty bound to give effect to its terms. And, while the Constitution is not to be construed in any narrow or pedantic sense, the court is also not at liberty to stretch or pervert its language in the interest of any legal or constitutional theory. (paras 66-71)

Per Hamid Sultan Abu Backer JCA (dissenting):

(1) The parties herein have resorted to convoluted arguments and jurisprudence which had resulted in a convoluted judgment and it is all because of their lack of appreciation relating to *inter alia*: (i) the concept of parliamentary and constitutional supremacy; and (ii) the rule of law relating to parliamentary and constitutional supremacy. (para 12)

(2) The jurisprudence involved in the administration of justice in both parliamentary and constitutional supremacy is not one and the same. A decision by a coram of judges applying the rule of law relating to parliamentary supremacy may not be the same as the decision of another coram applying the rule of law relating to constitutional supremacy. In terms of fundamental rights, a decision based on parliamentary supremacy may not inspire confidence on the affected populace when there is a legitimate expectation that the judiciary by its oath of office would protect the fundamental rights under the Constitution. (para 16)

(3) Judicial review is the process where legislative and executive actions are reviewed by the judiciary upon a complaint by the public that his or their rights have been infringed. Judicial review parameters of the court under the doctrine of constitutional supremacy are wide. The judiciary is empowered to review: (a) executive decisions; (b) legislation; (c) any constitutional amendment; and (d) any policy decision. (para 16)

(4) Article 121(1A) of the Constitution does not permit the civil courts to deal with matters within the jurisdiction of the Syariah Courts. However, it does not exclude the jurisdiction of the civil courts' judicial

review powers in the administrative decision of the State or its agencies or officers. What the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of jurisdiction. (para 5)

(5) The Enactment has 11 Parts and 113 sections, but not all the parts or sections are protected by art. 121(1A) of the Constitution. The most relevant part where art. 121 (1A) is applicable to Syariah Courts is Part IV which has 22 sections (sections 44 to 66), and even that, not all of the 22 sections are relevant to art. 121(1A). The other parts and sections are not relevant to art. 121(1A) of the Constitution. (paras 4 & 5)

(6) The order of the Syariah Court dated 29 April 2009 giving the appellant permanent custody of the children was made against a non-Muslim (respondent). It was therefore made in excess of jurisdiction as it contravened s. 50 of the Enactment, which asserts that the Syariah Court has no jurisdiction to hear an application by an applicant when he names a non-Muslim as a defendant. The appellant, in doing so, had abused the process of the Syariah Court and breached the constitutional guarantees relating to procedural fairness to non-Muslims. (paras 18, 22 & 24)

(6a) It is also well-settled and upheld by provisions in State Enactments that is similar to s. 50(3)(b) of the Enactment that if the issue that is to be decided involves a Muslim and a non-Muslim, the jurisdiction does not lie with the Syariah Court and common sense dictates that it has to fall under the Civil Courts. Hence, the appeals need to be dismissed. (paras 32 & 33)

(7) The Pendaftar Muallaf in the instant case is under the umbrella of the Pengarah and any administrative decision emanating from him is amenable to judicial review. It ought to be also noted that the Pendaftar Muallaf's Certificates has nothing to do with the jurisdiction or decision of the Syariah Court as asserted in art. 121(1A) of the Constitution. (paras 3 & 6)

(8) The application as made by the appellant to the Pendaftar Muallaf is in breach of ss. 96 and 106 of the Enactment. The two sections do not permit a third party such as a parent from making the application. The application must be done by the person who wants to convert to the religion of Islam and must satisfy the requirement of s. 96, and in the case of a minor, consent from the parent or guardian pursuant to s. 106 must be obtained. Thus, in this case, for a valid administrative conversion to take place, the application must be made by the three children and the parent must consent. Additionally, the children must affirm the 'Kalimah Shahadah' as set out in s. 96. If a person or child has not affirmed the 'Kalimah Shahadah', no conversion can validly take place. It is as simple as that. (para 25)

(9) The children here have not made the application nor recited the 'Kalimah Shahadah' nor requested for the appellant's consent. In consequence, without the administrative compliance of ss. 96 and 106, the Registrar of Muallaf could not in law have issued a certificate under s. 101 of the Enactment. It follows that as per the principle enunciated in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (where an order of court is made in breach of statute, it is made without jurisdiction and may be declared void and set aside), the Certificates or the administrative order of the Pendaftar Muallaf is a nullity *ab initio*, and ought to be set aside as of right for non-compliance with ss. 96 and 106 of the Enactment. It further follows that the order of the High Court quashing the administrative decision was correct, though not for the reasons stated by the learned JC. (paras 17, 26 & 28)

Bahasa Malaysia *Headnotes*

Rayuan-rayuan ini adalah terhadap keputusan yang arif Pesuruhjaya Kehakiman ('PK') yang memutuskan, dalam satu prosiding semakan kehakiman di hadapannya, bahawa pemelukan agama Islam oleh anak-anak perayu dan responden dalam rayuan pertama tidak sah, tidak berperlembagaan, terbatal dan tidak berkesan. Faktanya adalah bahawa perayu dan responden berkahwin pada tahun 1993 di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976. Pada tahun 2009, perayu memeluk agama Islam, dan berikutnya berjaya memohon kepada Jabatan Agama Islam, Perak untuk mengislamkan sekali anak-anak mereka, yang masing-masing berumur 12 tahun, 11 tahun dan 11 bulan. Tidak dinafikan bahawa tiga Sijil Pemelukan Islam ('Sijil') mengesahkan pengislaman anak-anak tersebut telah dikeluarkan oleh Pengarah Jabatan Agama Islam ('Pendaftar') dan/atau Pendaftar Muallaf, Perak, dan bahawa, ekoran permohonan perayu, satu perintah jagaan tetap dikeluarkan oleh Mahkamah Syariah kepada perayu. Menjadi pandangan yang arif Pesuruhjaya Kehakiman ('PK'), dalam membenarkan semakan kehakiman, dan mengetepikan pengislaman dan keputusan Pengarah dan Pendaftar Muallaf, bahawa: (i) hal perkara di hadapannya adalah sebenarnya berkaitan dengan isu Perlembagaan sekaligus menyebabkan Mahkamah Syariah tiada bidang kuasa untuk mengadilinya; (ii) pemelukan Islam melanggar peruntukan hak-hak asasi yang termaktub dalam Perlembagaan Persekutuan ('Perlembagaan'), terutama fasal-fasal 3, 5, 8 dan 11; (iii) kaedah-kaedah keadilan semulajadi telah dilanggar apabila Pengarah, atau Pendaftar Muallaf ataupun Mahkamah Syariah langsung tidak mendengar pihak responden mahupun anak-anaknya; (iv) Seksyen 96 dan 106 Enakmen Pentadbiran Agama Islam (Perak) 2004 ('Enakmen') telah dilanggar, oleh kerana, semasa pengislaman, tiada Kalimah Shahadah dilafazkan oleh anak-anak tersebut, dan tiada persetujuan bertulis diperoleh daripada ibu atau bapa mereka; dan (iv) pengislaman tanpa persetujuan ibu atau bapa yang tidak memeluk Islam atau anak-anak itu sendiri bertentangan dengan norma-norma dan konvensyen antarabangsa.

Dalam menghujahkan rayuan-rayuan mereka di hadapan yang arif hakim-hakim rayuan, perayu-perayu, secara bersesama dan bersendirian dan pada asasnya menghujahkan, pertama, bahawa yang arif PK tiada bidang kuasa untuk menentukan isu mengenai pengislaman anak-anak di sini kerana bidang kuasa untuknya terletak secara eksklusif pada Mahkamah Syariah; kedua, bahawa yang arif hakim melakukan kekhilafan besar menangani isu bidang kuasa dengan mengupas maksud peruntukan-peruntukan hak asasi dalam Perlembagaan; dan ketiga, bahawa pengislaman anak-anak dalam kes ini tidak melanggar Enakmen mahupun Perlembagaan.

Diputuskan (membenarkan rayuan; memutuskan bahawa pengislaman dibuat selaras dengan kehendak undang-undang)
Oleh Balia Yusof Wahi HMR (keputusan majoriti):

(1) Anak sulung telah mencapai umur dewasa semasa perbicaraan rayuan-rayuan dan berhak memilih agamanya sendiri. Isu mengenai pengislamannya dengan itu menjadi akademik dan tiada perintah dibuat mengenai pengislamannya.

(2) Mengambil kira keputusan-keputusan kes dan 'pendekatan hal perkara', jelas bahawa isu mengenai sah atau tidak sahnya pemelukan Islam seseorang, dan kerana itu sama ada seseorang itu beragama Islam atau sebaliknya, adalah perkara yang termasuk dalam bidang kuasa khusus Mahkamah Syariah. Juga jelas, berdasarkan bacaan biasa s. 50 Enakmen, bahawa kuasa mengisytiharkan status seorang Islam secara khusus dalam bidang kuasa Mahkamah Tinggi Syariah. Yang arif PK, dalam mengisytiharkan bahawa pengislaman tidak sah, jelas mengingkari peruntukan s. 50(3)(b)(x) Enakmen. Yang arif PK khilaf atas isu awalan bidang kuasa yang dibangkitkan melalui bantahan awal dalam prosiding semakan kehakiman di hadapannya.

(3) Yang arif PK telah menangani hal perkara di hadapannya dengan cara yang salah apabila menyelusuri liku-liku dan maksud peruntukan hak-hak asasi dalam Perlembagaan. Perbicaraan di hadapannya semata-mata atas isu keperlembagaan proses pengislaman yang telah dicabar melalui permohonan semakan kehakiman. Yang arif walau bagaimanapun memutuskan berdasarkan keperlembagaan pengislaman itu sendiri. Atas alasan ini sahaja keputusan Mahkamah Tinggi wajar diketepikan. Membenarkan Mahkamah Tinggi menyemak keputusan tentang perkara-perkara yang jelas terangkum dalam bidang kuasa Mahkamah Syariah bertentangan dengan per. 121 Perlembagaan dan tidak konsisten dengan prinsip semakan kehakiman.

(4) Dalam mentafsir ss. 96 dan 106 Enakmen dan mengisytiharkan Sijil sebagai terbatal dan tak sah, dan mengisytiharkan seterusnya bahawa anak-anak tidak diislamkan dengan sah, yang arif PK terlepas pandang dan gagal mempertimbang peruntukan s. 101 Enakmen, terutamanya sub-s. (2), yang menyatakan bahawa Sijil Memeluk Islam adalah bukti

konklusif akan fakta-fakta yang tertera padanya. Tanpa keterangan sebaliknya, atau cabaran terhadap Sijil yang harus dibuat di Mahkamah Syariah, Sijil kekal baik dan teratur.

(4a) Perakuan Memeluk Islam (Sijil) yang menyatakan bahawa orang-orang yang namanya tercatat di situ telah didaftar dalam Daftar Muallaf menunjukkan bahawa proses pengislaman telah dibuat menurut cara yang memuaskan hati Pendaftar Muallaf. Ia menyatakan orang yang dicatatkan di dalamnya 'adalah disahkan telah memeluk Islam' dan 'surat ini membuktikan bahawa beliau adalah seorang Islam mengikut rekod jabatan ini'. Mahkamah Tinggi perlu menerima fakta-fakta sebagaimana yang dinyatakan dan ianya di luar kuasa yang arif PK untuk mempersoalkan fakta-fakta tersebut. Atas alasan serupa, bukan menjadi tugas yang arif PK untuk mempertimbang sama ada peruntukan ss. 96 dan 106 Enakmen telah dicabuli. Menangani isu tersebut bermakna menerjah isu kesahan pengislaman yang beliau tidak mempunyai bidang kuasa mengenainya. Oleh itu, pengataan yang arif PK tentang ketakpatuhan terhadap kedua-dua peruntukan Enakmen adalah satu salah arahan.

(5) Yang arif PK seterusnya khilaf dalam mendapati per. 11 Perlembagaan telah dilanggari. Dalam memutuskan per. 11 dilanggari kerana responden tidak diberi peluang mendidik anak-anak tentang rukun agamanya, yang arif PK gagal mematuhi keputusan yang dibuat oleh Mahkamah Persekutuan dalam *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* bahawa fasal 12(4) Perlembagaan bukan memberi hak untuk memilih agama anak-anak kepada kedua-dua ibu dan bapa. Pelaksanaan hak tersebut oleh salah seorang daripada mereka di bawah per. 12(4) tidak harus dan tidak boleh dianggap sebagai menolak hak yang satu lagi untuk mengamalkan atau menyebarkan agamanya di bawah fasal 11(1) Perlembagaan.

(6) Pendekatan yang diambil oleh yang arif PK apabila memikul tanggungjawab untuk menuruti secara terperinci norma-norma antarabangsa apabila mentafsir Perlembagaan adalah tidak selaras dengan prinsip tafsiran Perlembagaan yang sudah lama terpakai. Triti-triti antarabangsa tidak menjadi sebahagian undang-undang kita kecuali jika peruntukan-peruntukannya dimasukkan dalam undang-undang kita, dan untuk triti-triti sedemikian terpakai di Malaysia, Parlimen harus menggubal undang-undang mengenainya. Bagi kita, Perlembagaan adalah undang-undang tertinggi dan kita berkewajipan memberi kesan pada terma-termanya. Tambahan lagi, sementara Perlembagaan tidak harus ditafsirkan dengan secara ketat atau teliti, mahkamah juga tidak mempunyai kebebasan untuk melebar atau memesongkan perbahasannya demi kepentingan mana-mana teori undang-undang mahupun Perlembagaan.

A **Oleh Hamid Sultan Abu Backer HMR (menentang):**

(1) Pihak-pihak telah membangkitkan hujahan dan jurispruden yang berbelit-belit yang sekaligus membawa kepada penghakiman yang juga berbelit-belit dan semuanya disebabkan oleh kegagalan mereka memahami, antara lain: (i) konsep keagungan Parlimen dan Perlembagaan; dan (ii) kedaulatan undang-undang berkaitan ketertinggian Parlimen dan Perlembagaan.

(2) Jurispruden yang terbabit dalam pentadbiran keadilan dalam kedua-dua keagungan Parlimen dan Perlembagaan bukanlah satu perkara yang sama atau serupa. Satu, keputusan yang dibuat oleh satu koram hakim yang melaksanakan kedaulatan undang-undang berhubung keagungan Parlimen mungkin tidak sama dengan keputusan yang dibuat oleh satu koram lain yang melaksanakan kedaulatan undang-undang berhubung keagungan Perlembagaan. Dari segi hak asasi, satu keputusan yang berasaskan keagungan Parlimen mungkin tidak dapat memberi keyakinan kepada mereka yang terjejas dengannya, memandangkan wujud suatu harapan sah bahawa badan kehakiman melalui sumpah jawatannya akan melindungi hak-hak asasi di bawah Perlembagaan.

(3) Semakan kehakiman adalah proses di mana tindakan-tindakan pihak legislatif dan eksekutif disemak oleh badan kehakiman ekoran aduan oleh orang awam bahawa haknya atau hak-hak mereka telah dicabuli. Ruang lingkup semakan kehakiman mahkamah di bawah doktrin ketertinggian Perlembagaan luas. Badan kehakiman berkuasa menyemak: (a) keputusan eksekutif; (b) undang-undang; (c) apa-apa pindaan Perlembagaan; dan (d) apa-apa keputusan dasar.

(4) Fasal 121(1A) Perlembagaan tidak membenarkan mahkamah sivil untuk menangani hal-hal yang termasuk dalam bidang kuasa Mahkamah Syariah. Walau bagaimanapun, ia tidak mengetepikan kuasa semakan mahkamah sivil terhadap keputusan-keputusan pentadbiran Kerajaan Negeri atau agensi-agensi atau pegawai-pegawainya. Apa yang mahkamah sivil tidak boleh lakukan adalah untuk campur tangan dalam keputusan-keputusan sah Mahkamah Syariah yang dibuat di bawah atau secara yang tidak melebihi bidang kuasanya.

(5) Enakmen mempunyai 11 Bahagian dan 113 seksyen, namun tidak semua bahagian atau seksyen-seksyen tersebut dilindungi oleh fasal 121(1A) Perlembagaan. Bahagian yang paling relevan di mana fasal 121(1A) terpakai pada Mahkamah Syariah adalah Bahagian IV yang mempunyai 22 seksyen (ss. 44 hingga 66), dan itu pun, tidak kesemua 22 seksyen tersebut relevan kepada fasal 121(1A). Bahagian-bahagian dan seksyen-seksyen lain tidak relevan pada fasal 121(1A) Perlembagaan.

(6) Perintah Mahkamah Syariah bertarikh 29 April 2009 yang memberi hak jagaan tetap anak-anak kepada perayu dibuat melangkaui bidang kuasa Mahkamah Syariah, kerana ia ditujukan terhadap seorang orang bukan Islam (responden), dan secara khusus melanggar peruntukan s. 50 Enakmen, oleh kerana Mahkamah Syariah, di bawah s. 50 tersebut, tiada bidang kuasa untuk mendengar permohonan perayu yang menamakan seorang bukan Islam sebagai defendan. Perayu, dalam berbuat demikian, telah mencabuli jaminan Perlembagaan berkaitan keadilan prosedur untuk orang-orang bukan Islam.

(6a) Adalah sesuatu yang lama terpakai dan ditetapkan oleh peruntukan Enakmen-Enakmen Negeri yang serupa dengan s. 50(3)(b) Enakmen bahawa, jika isu yang perlu diputuskan melibatkan seorang Islam dan seorang bukan Islam, maka bidang kuasa terhadapnya tidak berada pada Mahkamah Syariah, dan akal budi menetapkan bahawa ianya harus terangkum di bawah bidang kuasa mahkamah sivil. Maka rayuan-rayuan di sini seharusnyalah ditolak.

(7) Pendaftar Muallaf dalam kes ini berada di bawah seliaan Pengarah dan sebarang keputusan pentadbiran olehnya tertakluk pada semakan kehakiman. Harus diingat bahawa Sijil Pendaftar Muallaf tiada kaitan langsung dengan bidang kuasa atau keputusan Mahkamah Syariah seperti yang diperkatakan oleh fasal 121(1A) Perlembagaan.

(8) Permohonan seperti yang dibuat oleh perayu kepada Pendaftar Muallaf telah melanggar ss. 96 dan 106 Enakmen. Kedua-dua seksyen tidak membenarkan pihak ketiga seperti seorang ibu atau bapa untuk membuat permohonan. Permohonan mesti dibuat oleh orang yang hendak memeluk agama Islam itu sendiri dan mesti mematuhi kehendak s. 96, dan dalam kes seorang budak, persetujuan ibu atau bapa atau penjaganya mesti diperoleh. Oleh itu, dalam kes ini, untuk mengesahkan pemelukan Islam secara administratif tersebut, permohonan hendaklah dibuat oleh ketiga-tiga anak dan ibu atau bapa mereka hendaklah merestuinya. Selain itu, ketiga-tiga anak hendaklah melafazkan kalimah Shahadah seperti yang disebut oleh s. 96. Jika kalimah Shahadah tidak dilafaz, maka tiada pengislaman yang sah boleh berlaku. Ianya adalah semudah itu.

(9) Anak-anak dalam kes ini tidak membuat permohonan dan tidak juga melafazkan kalimah Shahadah atau memohon persetujuan perayu. Oleh itu, tanpa pematuhan administratif ss. 96 dan 106, Pendaftar Muallaf tidak boleh di sisi undang-undang mengeluarkan Sijil di bawah s. 101 Enakmen. Ianya mengikut bahawa berdasarkan prinsip seperti yang diutarakan dalam *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (di mana sesuatu perintah mahkamah dibuat secara yang melanggari statut, maka ianya dibuat tanpa bidang kuasa dan boleh diisytihar sebagai tak sah dan diketepikan), Sijil atau perintah administratif Pendaftar Muallaf adalah terbatal *ab initio*, dan

perlu dengan sendirinya diketepikan kerana tidak mematuhi ss. 96 dan 106 Enakmen. Ianya mengikut seterusnya bahawa perintah Mahkamah Tinggi yang membatalkan keputusan administratif tersebut betul, walaupun bukan atas alasan-alasan seperti yang dikatakan oleh yang arif PK.

Case(s) referred to:

Air Asia Bhd v. Rafizah Shima Mohamed Aris [2015] 2 CLJ 510 CA ***(refd)***

Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor [2003] 4 CLJ 281 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors [2007] 5 MLJ 441 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal [2014] 4 CLJ 253 FC ***(refd)***

IC Golaknath v. State of Punjab AIR (1967) SC 1643 ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors [2013] 7 CLJ 82 HC ***(refd)***

Kesavananda Bharathi v. State of Kerala [1973] 4 SCC 225 ***(refd)***

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(refd)***

Nedunchelian V Uthiradam v. Nurshafiqah Mah Singgai Annal & Ors [2005] 2 CLJ 306 HC ***(refd)***

Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***

Nik Noorhafizi Nik Ibrahim & Ors v. PP [2014] 2 CLJ 273 CA ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Regina v. Secretary of State for the Home Department, Ex parte Brind & Ors [1991] 1 AC 696 ***(refd)***

Sajjan Singh v. State of Rajasthan AIR (1965) SC 845 ***(refd)***

Saravanan Thangathoray v. Subashini Rajasingam & Another Appeal [2007] 2 CLJ 451 CA ***(foll)***

Shankari Prasad Singh Deo v. Union of India AIR (1951) SC 458 ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(foll)***

Surinder Singh Kanda v. The Government of the Federation of Malaya [1960] 1 LNS 132 HC ***(refd)***
Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2013] 1 LNS 1465 HC ***(refd)***
Teoh Eng Huat lwn. The Kadhi of Pasir Mas, Kelantan & Anor [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC ***(refd)***
Yong Fuat Meng v. Chin Yoon Kew [2008] 5 CLJ 705 HC ***(refd)***

Legislation referred to:
Administration of the Religion of Islam (Perak) Enactment 2004, ss. 2, 50(3)(b)(x), (xi), 96, 100, 101, 106(b)
Administration of the Religion of Islam (State of Selangor) Enactment 2003, s. 112
Federal Constitution, arts. 3(1), 4(1), 5(1), 8(1), (2), 11(1), 12(3), (4), 37(1), 121(1A), 160
Guardianship of Infants Act 1961, ss. 5, 11

Other source(s) referred to:
Peter Leyland, *The Constitution of the United Kingdom,* 2nd edn, 2012, p 50

(Civil Appeal No: A-02-1826-08-2013)
For the appellant - Hatim Musa; M/s Hatim Musa & Co

(Civil Appeal No: A-01-304-08-2013)
For the appellants - Rohana Abdul Malek (Shuhaida Harun with her) SFCs

(Civil Appeal No: A-01-316-09-2013)
For the appellants - Shamsul Bolhassan (Khairul Fazli with him) SFC
For the respondent - Fahri Azzat; M/s Azzat & Izzat
Aston Paiva; M/s Amerbon
M Kulasegaran; M/s Kula & Assocs

[Appeal from High Court, Ipoh; Judicial Review No: 25-10-2009 (overruled)]

Reported by Wan Sharif Ahmad

JUDGMENT

Balia Yusof Wahi JCA:

Background

[1] Pathmanathan (husband) and Indira Ghandi (wife) were married on 10 April 1993. The marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). There were three children of the marriage, Tevi Darsiny, aged 12, Karan Dinish, aged 11 and the youngest, Prasana Diksa, who was 11 months old at the time of filing of the wife's application for judicial review.

[2] On 11 March 2009, the husband converted to Islam and on 8 April 2009, he obtained an *ex parte* interim custody order for all the three children. He later obtained a permanent custody order from the Shariah Court on 29 September 2009.

[3] At the time of the husband's conversion, the two elder children were residing with the wife while the youngest child was with the husband.

[4] Sometime in April 2009, the wife received documents from the husband showing that her three children had been converted to Islam on 2 April 2009 and that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam on her three children. The documents also showed that the Pendaftar Muallaf had registered the children as Muslims.

[5] Feeling distraught and being dissatisfied with the husband's action, the wife then filed an application for judicial review in the Ipoh High Court *vide* Semakan Kehakiman no. 25-10-2009 seeking for the following orders and/or reliefs:

(a) an Order of *certiorari* pursuant to Order 53 rule 8(2) to remove the Certificates into the High Court to be quashed owing to non-compliance with section 99, 100 and 101 of the Administration of the Religion of Islam (Perak) Enactment 2004;

(b) an order of prohibition pursuant to Order 53 rule 1 restraining Pendaftar Muallaf and his servants, officers and/or agents from howsoever registering or causing to be registered the children and each of them as 'Muslims" or "muallaf" pursuant to the Administration Enactment;

(c) further or in the alternative, a declaration that the Certificates and each of them are null and void and of no effect as they are *ultra vires* and/or contrary to and/or inconsistent with

(i) the provisions of Part IX and in particular section 106(b) of the Administration Enactment, and/or

(ii) Sections 5 and 11 of the Guardianship of Infants Act 1961 (Act 351), and/or

(iii) Article 12(4) read together with Article 8(2) of the Federal Constitution.

(d) Further or in the alternative, a declaration that the infants and each of them have not been converted to Islam in accordance with the law;

(e) The costs of the application; and

(f) Such further or other relief as the Honourable Court deems fit.

[6] In the said application, the husband was cited as the sixth respondent while the Pengarah Jabatan Agama Islam Perak, The Pendaftar Mualaf, Kerajaan Negeri Perak, Kementerian Pelajaran Malaysia and Kerajaan Malaysia were respectively cited as the first to the fifth respondents.

[7] On 25 July 2013, the learned Judicial Commissioner (JC) allowed the wife's judicial review application in the terms as prayed. The three certificates of conversion to Islam issued by the Pengarah Jabatan Agama Islam Perak were quashed. The learned JC further declared that the said certificates to be null and void and of no effect.

[8] This is an appeal by the husband against the said decision of the High Court which was registered as Civil Appeal No. A-02-1826-08/2013.

[9] Alongside the husband's appeal, the Pengarah Jabatan Agama Islam Perak, the Pendaftar Mualaf and Kerajaan Negeri Perak also filed an appeal to this court which was registered as Civil Appeal No. A-01-304-08/2013. Kementerian Pelajaran Malaysia and Kerajaan Malaysia also filed their appeal which was registered as Civil Appeal No. A-01-316-09/2013.

[10] We heard the three appeals together on 26 May 2015 and we reserved judgment.

[11] We now give our judgment.

The High Court Decision

[12] The order pronounced by the learned JC at p. 100 of the rekod rayuan states that the three certificates of conversion to the religion of Islam issued by the Pengarah Jabatan Agama Islam Perak be quashed. The said certificates were declared to be null and void and of no effect. All the three children had not been converted to Islam in accordance with the law.

[13] In dealing with the application before him, the learned JC had formulated various issues which were listed as follows.

(a) Whether the High Court has jurisdiction to hear the case;

(b) Whether the conversion of the children without the consent of the non-converting parent violates arts. 8, 11 and 12 of the Federal Constitution;

(c) Whether the conversion of the children without the consent of the non-converting parent and in the absence of the children before the converting authority violates the Administration of the Religion of Islam (Perak) Enactment 2004;

(d) Whether the conversion without the consent and without hearing the other non-converting parent as well as without hearing the children violates the principles of natural justice; and

(e) Whether the conversion without the consent of the non-converting parent and the children violate international norms and conventions.

[14] On the issue of jurisdiction, the learned JC was of the view that since the core of the challenge by the wife is the constitutional construct on the fundamental liberties provision of the Federal Constitution, the Shariah Court lacks the jurisdiction to decide on the constitutionality of the matter.

[15] On art. 12 of the Federal Constitution, emphasis was made on cl. 4 of the same which provides:

> (4) For the purposes of clause (3) the religion of a person under the age of eighteen years shall be decided by the parent or guardian.

[16] The Federal Court in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 has put beyond doubt that the word parent in art. 12(4) means a single parent.

[17] The learned judge being bound by the said decision had rightly concluded that the conversion by the husband does not violate art. 12(4).

[18] Article 8 of the Federal Constitution, in the learned JC's view had been violated. The wife had not been accorded the equal protection of the law. Section 5 of the Guardianship of Infants Act 1961 gives equal rights to both parents while s. 11 of the same requires the court or a judge in exercising his powers under the Act to consider the wishes of such parent or both of them. The wife being a non-Muslim can never be heard before the Shariah Court and thus had been denied of the equality protection as enshrined under art. 8 of the Federal Constitution. However, in deference to the decision of the Federal Court in *Subashini*'s case *(supra)* and based on the doctrine of *stare decisis*, the learned JC admittedly had to concede that the conversion by the single parent had not violated art. 8.

[19] Article 11 of the Federal Constitution guaranties the freedom of religion where it is declared that every person has the right to profess and practice his religion. The learned JC was of the view that the practice of one's religion would include the teaching of the tenets of faith to one's religion. His Lordship ruled that for the non-Muslim wife not to be able to teach her children the tenets of her faith would be to deprive her constitutional rights not just under art. 11 but also arts. 5(1) and 3(1) of the Federal Constitution.

[20] In dealing with the issue of whether the conversion contravenes the provisions of the Administration of the Religion of Islam (Perak) Enactment 2004, (the Perak Enactment) the learned JC had dealt with the provision of ss. 96 and 106 of the same. These two provisions are contained under Part IX which relates to conversion to the religion of Islam.

[21] Section 96 reads:

> 96(1) The following requirements shall be complied with for a valid conversion of a person to Islam:
>
> (a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;
>
> (b) at time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean "I bear witness that there is no god but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and
>
> (c) the utterance must be made of the person's own free will.
>
> (2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the 2 clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (1)(b) of the subsection.

And s. 106 reads:

> 106. For the purpose of the Part, a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and:
>
> (a) has attained the age of eighteen years; and
>
> (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

[22] Reading the two aforesaid provisions together, the learned JC concluded that the imperative words in s. 96 "the following requirements shall be complied with for a valid conversion of a person to Islam" means that the consent by the parent must be in writing and that the absence of the children to utter the two clauses of the Affirmation of Faith rendered the conversion to be void. His Lordship concluded that "the said certificates of conversion to the religion of Islam are null and void and of no effect for non-compliance with s. 96 of the Perak Enactment."

[23] Moving further, the learned JC held that even if the consent of a single parent would suffice under s. 106(b) of the Perak Enactment, there is nevertheless a need to give the non-converting parent the right to be heard. As it happened in this case as both the mother and the children have not been heard, the certificate of conversion cannot be sustained and ought to be quashed. His Lordship cited *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato Ting Check Sii* [2009] 4 CLJ 449; [2009] MLJU 403 and *Surinder Singh Kanda v. The Government of the Federation of Malaya* [1960] 1 LNS 132; [1962] MLJ 169 upholding the principle that the right to be heard is an integral part of the rules of natural justice and failure to observe rules of natural justice renders a decision to be void.

[24] The other issue formulated by the learned JC was whether the conversion without the consent of the non-converting parent and the three children violates international norms and conventions.

[25] In dealing with the said issue, the learned JC had opined that Malaysia had accorded the Universal Declaration of Human Rights 1948 a statutory status and given a primal place in our legal landscape. It is part and parcel of our jurisprudence. As such an interpretation of arts. 12(4) and 8(1) and (2) of the Federal Constitution vesting equal rights to both parents to decide on a minor child's religious upbringing and religion would be falling in tandem with such international human rights principles. His Lordship also considered the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which have been ratified by the Government and further opined that an interpretation which promotes the granting of equal rights to the children, the mother and the father where guardianship is concerned under the Guardianship of Infants Act 1961 ought to be adopted in line and consistent with international norms. Likewise, the same approach of interpretation should also be applied with equal force to the provision of ss. 96 and 106 of the Perak Enactment.

A **The Appeal**

[26] At the outset, we were informed that the eldest child has, at the time of hearing of this appeal reached the age of majority and above 18 years old. Puan Rohana, the state Legal Advisor of Perak, representing the appellant in Appeal No. A-01-304-08/2013 submitted that the issue of her conversion is still very much alive and this court ought to make a pronouncement. Encik Fahri Azzat, learned counsel for the respondent submitted otherwise. Relying on the authority of the Supreme Court's decision in *Teoh Eng Huat v. The Kadhi of Pasir Mas, Kelantan & Anor* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277; [1990] 2 MLJ 300 he submitted that the matter has become academic. Being an adult, she has her own right to decide her religion.

[27] We agree with the submissions of learned counsel for the respondent. We make no order in respect of her conversion to the religion of Islam.

[28] In pursuing these three appeals, the common issue raised by all the appellants is centred on the issue of jurisdiction of the High Court in determining the matter. We are of the view and have taken the approach that the issue of jurisdiction ought to be answered first. In our view, if the High Court lacked the jurisdiction to deal with the issue of conversion to the religion of Islam, that will be the end of the matter under the appeal and on that ground alone the three appeals ought to be allowed, and to go and venture into the other issues will be purely academic and will not affect the decision of these appeals.

[29] Learned State Legal Advisor of Perak cited a list of authorities touching on the issue of jurisdiction of the civil courts on matters relating to conversion to the religion of Islam. She started by stressing that the approach to be taken by the courts would be the "subject matter" approach and cited *Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor* [2003] 4 CLJ 281, *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289, *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 2 CLJ 5, FC, *Nedunchelian V Uthiradam v. Nurshafiqah Mah Singgai Annal & Ors* [2005] 2 CLJ 306, *Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 4 CLJ 253; [2014] 3 MLJ 757, in support of her contention.

[30] Learned Senior Federal Counsel representing the Government of Malaysia and the Kementerian Pelajaran Malaysia in appeal No. A-01-316-09/2013 and En Hatim Musa learned counsel for the appellant in appeal No. A-01-1826-08/2013 echoed a similar view and adopted the same line of argument as above.

[31] Learned counsel for the respondent, Mr Fahri Azzat submitted that the conversion was not done by the Shariah Court but by the Pendaftar Muallaf who is under the Jabatan Agama Islam Negeri Perak. Jabatan Agama Islam Negeri Perak is a state body and not a Shariah Court under art. 121(1A) of the Federal Constitution. He further submitted that ss. 96 and 106 of the Perak Enactment do not confer powers to the Shariah Court on

the issue of conversion. The powers are conferred on the Registrar of Muallaf. Such power is purely administrative in nature and therefore its exercise is amenable to judicial review. There was no right of being heard given before the Registrar of Muallaf and the certificate was not issued by the Registrar of Muallaf.

[32] Learned counsel further submitted that the conversion without the consent of the wife is *ultra vires* the provisions of the Perak Enactment and against international norms which requires the wife's consent. There is a breach of the rules of natural justice. Learned co-counsel, Mr Kulasegaran submitted along the same line.

[33] Having heard the submissions of all parties, and having considered the rich plethora of cases submitted before us, we are of the view that taking the "subject matter approach", it is beyond a shadow of doubt the issue of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Shariah Court. The determination of the validity of the conversion of any person to the religion of Islam is strictly a religious issue and it falls within the exclusive jurisdiction of the Shariah Court.

[34] In *Hj Raimi b. Abdullah v. Siti Hasnah Vangarama bt. Abdullah (supra)* the two questions posed before the Federal Court were:

(1) Whether the civil or the Shariah Court has the jurisdiction to determine whether a person professes Islam or not; and

(2) Whether the civil court has the jurisdiction to determine the validity of the conversion to Islam of a minor.

[35] The Federal Court held that the Shariah Court shall have the exclusive jurisdiction to determine whether a person professes Islam or not and further decided that on the facts of the case the validity of the plaintiff's conversion falls within the exclusive jurisdiction of the Shariah Court too. In allowing the appeal, the Federal Court held:

> (1) Article 121 of the Federal Constitution ('the Constitution') clearly provided that the civil court shall have no jurisdiction on any matter falling within the jurisdiction of the Shariah Court. The matters that fall within the jurisdiction of the Shariah Court were as provided under art 74 of the Constitution, *inter alia*, matters falling within the State List in the Ninth Schedule which were Islamic law, personal and family law of person professing the religion of Islam. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Shariah Court. It would be highly inappropriate for the civil court, which lacks jurisdiction pursuant to art 121, to determine the validity of the conversion of any person to the religion of Islam as this is strictly a religious issue. Therefore, the question of the plaintiff's conversion in 1983 fell within the exclusive jurisdiction of the Shariah Court.

[36] On those authorities we are left in no doubt that the learned JC had erred on the very first issue of jurisdiction which was taken by way of a preliminary objection in the judicial review proceedings before him.

[37] Deliberating further on the issue of the jurisdiction of the Shariah Court, one has to look in the provisions of s. 50 of the Perak Enactment. Specifically, sub-ss. (3)(b)(x) and (xi) of s. 50 confers jurisdiction on the Shariah High Court. It reads:

> (3) The Shariah High Court shall:
>
> (a) …
>
> (b) in its civil jurisdiction, hear and determine all actions and proceedings of all the parties to the actions or proceedings are Muslims and the actions and proceedings relate to:
>
> …;
>
> …;
>
> (x) a declaration that a person is no longer a Muslim;
>
> (xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and
>
> (xii) …

[38] A plain reading of the aforesaid provisions puts it beyond doubt that the power to declare the status of a Muslim person is within the exclusive jurisdiction of the Shariah High Court. The order of the High Court declaring that the conversion is null and void is a transgression of s. 50(3)(b)(x) of the abovesaid provision.

[39] Learned Senior Federal Counsel, appearing for the appellants in Appeal No. A-01-316-09-2013 further added to the submissions of learned State Legal Advisor Perak saying that the approach taken by the learned JC in deciding on the issue of the jurisdiction of the High Court was the "remedy" approach. In determining whether the High Court had jurisdiction on the matter, His Lordship had stated at p. 10 of his grounds of judgment:

> The core of the challenge is the constitutional construct of the fundamental liberties provisions of the Constitution. The Shariah Court is a creature of State law and does not have jurisdiction to decide on the constitutionality of matters said to be within its exclusive purview and province. Only the superior civil Courts being a creature of the Constitution can.

And continuing at p. 18 of the same:

> On the contrary the civil High Court would have jurisdiction as what the Applicant is challenging is the constitutionality of the various actions of the Respondents in converting the children to a civil marriage to Islam as well as asserting her rights under the Fundamental Liberties provisions in Part II of the Federal Constitution as well as under the Guardianship of Infants Act 1961.

[40] Encik Hatim b Musa, learned counsel for the appellant/husband in Appeal No. A-01-1826-08/2013 adopted in full the submissions of the learned State Legal Advisor Perak and the Senior Federal Counsel on the issue of the jurisdiction of the High Court echoing that the learned JC had

erroneously approached the issue before the court by venturing into the constitutional construct of the fundamental liberties provisions of the Federal Constitution.

[41] We agree with the aforesaid submissions. The learned JC had erred in his approach of dealing with the subject matter before him. His Lordship had decided on the constitutionality of the conversion instead. His approach was solely on the constitutional interpretation of the various provisions in the Federal Constitution. The hearing before him was simply on the constitutionality of the conversion process which was challenged by way of a judicial review application.

[42] We are of the view that on this ground alone these appeals ought to be allowed and for the judgment of the High Court to be set aside. To allow the High Court to review decisions on matters which are within the exclusive province of the Shariah Court is in contravention of art. 121 of the Federal Constitution and inconsistent with the principles of judicial review.

[43] The argument that only the Shariah Courts have exclusive jurisdiction, but not the Majlis Agama Islam or officers is not a pivotal issue. The pivotal issue is whether the High Court has jurisdiction, irrespective of whether or not the Majlis Agama Islam has jurisdiction. The subject matter of the suit is clearly outside the legal competency of the High Court. In addition, the lack of remedy for the respondent cannot *ipso facto* confer jurisdiction on the High Court.

[44] We wish to further add that the learned JC in exercising his judicial review powers must do so with utmost care and circumspection taking into consideration the subject matter of the case. As succinctly observed by Eddgar Joseph Jr FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 at p. 183 (CLJ); p. 191 (MLJ):

> … the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors.

[45] Be that as it may, we feel impelled to deal with all the other issues formulated by the learned JC and we begin with the issue of whether the conversion of the children has contravened the provisions of the Perak Enactment, namely, ss. 96 and 106. We have reproduced the said two provisions in the earlier part of this judgment.

[46] In so doing, we have to consider two other provisions of the Perak Enactment namely ss. 100 and 101.

[47] In interpreting the said two provisions of ss. 96 and 106 and in declaring the Certificates of Conversion to be null and void and of no effect and further declaring that the three children had not been converted to the religion of Islam, the learned JC had overlooked and failed to consider the provision of s. 101 of the Perak Enactment.

[48] Section 101 reads:

> Certificate of Conversion to the Religion of Islam
>
> 101(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.
>
> (2) A Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

[49] In our considered view, s. 2 of the said provision clearly declares the Certificate of Conversion to be conclusive proof of the facts stated in the certificate. The Certificates of Conversion of the children are shown at pp. 445, 448 and 451 of Rekod Rayuan Jld 2 Bahagian C in Appeal No. A-01-316-09-2013. It is titled Perakuan Memeluk Islam. It states the fact of the conversion of the person named therein.

[50] We further observed that the Perakuan Memeluk Islam issued by the Ketua Penolong Pengarah Bahagian Dakwah, b/p Pengarah Jabatan Agama Islam Perak Darul Ridzuan stated the fact that the persons named therein has been registered in the Register of Muallafs.

[51] The view taken by the respondent is quite simplistic in that the Registrar of Muallaf's action of issuing the certificate of conversion is an administrative act and thus amenable to judicial review. In our view, in the absence of any evidence to the contrary and in the absence of any challenge to the said certificates which must be done or taken in the Shariah Court, the said certificates remain good.

[52] The conclusiveness of a Certificate of Conversion was dealt with by this court in *Saravanan Thangathoray v. Subashini Rajasingam & Another Appeal* [2007] 2 CLJ 451. In dealing with an equipollent provision of s. 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, Suriyadi Halim Omar (as he then was) observed at p. 503:

> [74] The husband also has exhibited the "Kad Perakuan Memeluk Agama Islam" which was issued by Registrar of Muallafs who was appointed by Majlis Agama Islam Selangor under s. 110 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. It is written at the back of the said card that:
>
> > Kad in dikeluarkan kepada orang yang memeluk Agama Islam dan didaftarkan dalam Pendaftaran Muallaf Negeri Selangor berdasarkan seksyen 111 & 112 Bhg IX Enakmen Pentadbiran Agama Islam (Negeri Selangor) Tahun 2003 sebagai sijil pemelukan ke agama Islam.
>
> What it means is that this card is a Certificate of Conversion to Religion of Islam issued to the husband under s.112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. That s. 112 reads:

112(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.

(2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

It is to be observed that s. 112(2) clearly provides that that Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated therein. In the instant case it was stated in the husband's certificate that his date of conversion to Islam was on 18 May 2006. Under that s. 112(2) that fact is therefore conclusive.

[53] This finding was endorsed in the majority decision of the Federal Court where His Lordship Nik Hashim FCJ at p. 166 stated:

[12] In the present case, it is clear from the evidence that the husband converted himself and the elder son to Islam on 18 May 2006. The certificates of conversion to Islam issued to them under s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 conclusively proved the fact that their conversion took place on 18 May 2006. Thus, I respectfully agree with Hassan Lah JCA that the wife's petition was filed in contravention of the requirement under the proviso to s. 51(1) of the 1976 Act in that it was filed 2 months and 18 days short of 3 months after the husband's conversion to Islam. It follows therefore that the petition was premature and invalid and the summons-in-chambers, *ex parte* and *inter parte* based on the petition which were filed therein were also invalid.

[54] Section 100 of the Perak Enactment sets out the powers of the Registrar of Muallaf in determining whether a person may be registered as a muallaf. Section 100 reads:

Registration of Muallafs

100(1) A person who has converted to the religion of Islam may apply to the Registrar in the prescribed form for registration as a muallaf.

(2) If the Registrar is satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, the Registrar may register the applicant's conversion to the religion of Islam by entering in the Register of Muallafs the name of the applicant and other particulars as indicated in the Register of Muallafs.

(3) The Registrar shall also determine the date of the applicant's conversion to the religion of Islam and enter the date in the Register of Muallafs.

(4) In order to satisfy himself of the fact and date of conversion to the religion of Islam by the applicant and the other particulars to be entered in the Register of Muallafs, the Registrar may make such inquiries and call for such evidence as he considers necessary; but this subsection shall not be construed as precluding the Registrar from relying solely on the words of the applicant as far as the fact and date of conversion are concerned.

A (5) If the Registrar is not satisfied that the requirements of section 96 have been fulfilled in respect of the applicant, he may permit the applicant to utter, in his presence or in the presence of any of his officers, the two clauses of the Affirmation of Faith in accordance with the requirements of that section.

B **[55]** In our view, the issuance of the Perakuan Memeluk Islam stating that the persons named therein has been registered in the Register of Muallafs merely indicates that the issue of conversion has been satisfied and the fact that the persons named therein has been so registered, the process of conversion must have been done to the satisfaction of the Registrar. The three C impugned certificates state the person named therein "adalah disahkan telah memeluk Islam" and "surat ini membuktikan bahawa beliau adalah seorang Islam mengikut rekod pendaftaran jabatan ini." As such, we are of the view that the High Court has to accept the facts stated therein and it is beyond the powers of the learned JC to question the same.

D **[56]** On the same token, we are further of the view that it was not the business of the learned JC to consider whether the provisions of ss. 96 and 106 of the Perak Enactment had been violated. To dwell into the issue of whether the said provisions had been violated or otherwise is in effect transgressing into the issue of the validity of the conversion which E jurisdiction he had not. We reiterate that the issue of the validity of the conversion is a matter within the exclusive jurisdiction of the Shariah Court.

[57] Thus, the pronouncements by the learned JC on the non-compliance of the two provisions of the Perak Enactment is a misdirection which must be corrected.

F **[58]** The issue on the right of a single parent to convert a child or children to the marriage without the consent of the wife was dealt with by the Federal Court in the case of *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and Other Appeals (supra).* There, the wife complained that the husband who had converted to Islam had no right to convert either child of the marriage G to Islam without her consent. She contended that the choice of religion is a right vested in both parents by virtue of arts. 12(4) and 8 of the Federal Constitution and s. 5 of the Guardianship of Infants Act 1961.

[59] Likewise, the wife in the instant appeal had a similar complaint and the learned JC had formulated the issues accordingly as we have narrated H earlier with a further additional question of whether art. 11 of the Federal Constitution had been violated.

[60] The Federal Court in *Subashini*'s case had at pp. 171-172 of the report stated:

I CONVERSION

[25] The Wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of arts. 12(4) and 8 of the FC and s. 5 of the Guardianship of Infants Act 1961.

[26] After a careful study of the authorities, I am of the opinion that the complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in art. 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. In *Teoh Eng Huat v. Kadhi, Pasir Mas & Abor* [1990] 2 MLJ 300, Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, said at p 302:

> In all the circumstances, we are of the view that in the wider interests of the nation, no infants shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.
>
> Further down, His Lordship continued:
>
> We would observe that the appellant (the father) would have been entitled to the declaration he has asked for. However, we decline to make such declaration as the subject is no longer an infant. (emphasis added.)

Therefore, art. 12(4) must not be read as entrenching the right to choice of religion in both parents. That being so, art. 8 is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in *Nedunchelian* and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband *albeit* under the Selangor Enactment did not violate the FC. Also reliance cannot be placed on s. 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights since s. 1(3) of the same Act has prohibited the application of the Act to such person like the husband who is now a Muslim (see *Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah & Anor* [2004] 2 MLJ 241).

[61] The learned JC had found that for the non-Muslim parent in this appeal not being able to teach her children the tenets of her faith would be to deprive her of her constitutional rights under art. 11 of the Federal Constitution. That cannot be so.

[62] The Federal Court had, in *Subashini*'s case held that art. 12(4) must not be read as entrenching the right to choice of religion in both parents. In so holding that art. 11 has been violated because of her being deprived of the opportunity to teach the children the tenets of her religion, the learned JC in the instant appeal had run foul of the Federal Court's pronouncement that art. 12(4) of the Federal Constitution does not confer the right to choice of religion of children under the age of 18 in both parents. The exercise of the right of one parent under art. 12(4) cannot and shall not be taken to mean a deprivation of another parent's right to profess and practice his or her religion and to propagate it under art. 11(1) of the Federal Constitution.

[63] The learned JC had erred in finding that art. 11 of the Federal Constitution had been violated resulting in the conversion of the children to be unconstitutional, illegal, null and void and of no effect.

[64] We will now deal with the issue of whether the conversion of the children in the instant appeals violate international norms and conventions. The learned JC had found that in interpreting and assigning a meaning to the word "parents" in art. 12(4) of the Federal Constitution, "the interpretation that best promotes our commitment to international norms and enhance basic human rights and human dignity is to be preferred." A similar approach must also be made in dealing with the provisions of the Guardianship of Infants Act 1961 and arts. 8(1) and (2) of the Federal Constitution. International norms meant by His Lordship refers to the Universal Declaration of Human Rights 1948 (UDHR), The Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

[65] To start with, we wish to reiterate what the eminent judge Eusoffe Abdoolcadeer had stated about the UDHR in *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 at p. 209 as "merely a statement of principles devoid of any obligatory character and is not part of our municipal law. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules.

[66] It is trite that international treaties do not form part of our laws unless those provisions have been incorporated into our laws. The Federal Court in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 at p. 828 had stated:

> We should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statute, Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 at p. 355 had this to say:
>
> > So, in determining the constitutionality or otherwise of a statute under our constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as his Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 (FC) said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it."

[67] Speaking in a similar tone, the House of Lords in *Regina v. Secretary of State for the Home Department, Ex parte Brind and Ors.* [1991] 1 AC 696 in its judgment delivered by Lord Ackner at p. 762 said:

> As was recently stated by Lord Oliver of Aylmerton in *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry (the "International Tin Council case")* [1990] 2 AC 418, 500:
>
> Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res *inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside

> the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

[68] This court had expressed its view in *Air Asia Bhd v. Rafizah Shima Mohamed Aris* [2015] 2 CLJ 510; [2014] MLJU 606 that CEDAW does not have the force of law in this country because the same has not been enacted into the local legislation. For a treaty to be operative in Malaysia, Parliament must legislate.

[69] We must add that while the Constitution is not to be construed in any narrow or pedantic sense but this does not mean that this court is at liberty to stretch or pervert the language of the Constitution in the interest of any legal or constitutional theory. Neither we are a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us, the Federal Constitution is supreme and we are duty bound to give effect to its terms.

[70] As a word of caution, perhaps it would be a good reminder to refer to the words of Lord Bridge of Norwich in *Regina v. Secretary of State for the Home Department, Ex parte Brind & Ors (supra)* on judicial usurpation of the legislative function. As p. 748 of the report, His Lordship expressed:

> When confronted with a simple choice between two possible interpretation of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive and administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. If such a presumption is to apply to the statutory discretion exercised by the Secretary of State under section 29(3) of the Act of 1981 in the instant case, it must also apply to any other statutory discretion exercised by the executive which is capable of involving an infringement of Convention rights. When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

[71] In our view, the approach taken by the learned JC in imposing upon himself the burden of sticking very closely to the standard of international norms in interpreting the Federal Constitution is not in tandem with the accepted principles of Constitutional interpretation.

[72] In conclusion, for the reasons we have stated above, the appeals are hereby allowed and the order of the High Court is set aside. We make no order as to cost and further order that the deposit to be refunded.

Hamid Sultan Abu Backer JCA:

[73] There are three appeals before us relating to the judicial review application of the respondent in the High Court, where the respondent had applied to quash the administrative decision of the Pendaftar Muallaf, and not any orders of the Syariah Court. The learned trial judge had quashed the administrative decision and hence this appeal. The three appeals which were heard together are as follows:

(i) Appeal No. A-02-1826-08-2013 by Pathmanathan a/l Krishnan;

(ii) Appeal No. A-01-304-08-2013 by the Director of the Islamic Religious Affairs Department of Perak & Ors;

(iii) Appeal No. A-01-316-09-2013 by the Ministry of Education Malaysia & Anor.

In my view, it is sufficient to deal with the appeal by Pathmanathan to dispose of the other two appeals.

[74] The prayers for judicial review read as follows:

(a) an Order of *certiorari* pursuant to Order 53 rule 8(2) to remove the Certificates into the High Court to be quashed owing to non-compliance with section 99, 100 and 101 of the Administration of the Religion of Islam (Perak) Enactment 2004;

(b) an order of prohibition pursuant to Order 53, Rule 1 restraining Pendaftar Muallaf and his servants, officers and/or agents from howsoever registering or causing to be registered the children and each of them as "Muslims" or "muallaf" pursuant to the Administration Enactment.

(c) further or in the alternative, a declaration that the Certificates and each of them are null and void and of no effect as they are *ultra vires* and/or contrary to and/or inconsistent with

i. the provisions of Part IX and in particular section 106(b) of the Administration Enactment, and/or

ii. Sections 5 and 11 of the Guardianship of Infants Act 1961 (Act 351), and/or

iii. Article 12(4) read together with Article 8(2) of the Federal Constitution.

(d) Further or in the alternative, a declaration that the infants and each of them have not been converted to Islam in accordance with the law;

(e) The costs of the application; and

(f) Such further or other relief as the Honourable Court deems fit.

[75] Pendaftar Muallaf in the instant case is under the umbrella of the Pengarah Jabatan Agama Islam Perak and any administrative decision is amenable to judicial review. The parties do not dispute that it is an administrative decision. In consequence, the civil court has jurisdiction to hear the matter. It must be noted that the powers of the Pendaftar Muallaf is set out in the Administration of the Religion of Islam (Perak) Enactment 2004. The said Enactment consists of XI parts and 113 sections. The arrangement of the parts and section is set out below:

ENACTMENT NO. 4 OF 2004
ADMINISTRATION OF THE RELIGION OF ISLAM (PERAK) ENACTMENT 2004

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section 1. Short title and commencement.

Section 2. Interpretation.

Section 3. Saving of prerogative.

PART II – MAJLIS AGAMA ISLAM DAN 'ADAT MELAYU PERAK

Section 4. Establishment of the Majlis.

Section 5. Legal identity and functions of the majlis.

Section 6. The Majlis shall aid and advise Duli Yang Maha Mulia Sultan.

Section 7. Duty of the Majlis for the economic and social development of Muslims.

Section 8. Power to establish corporation.

Section 9. Power to establish companies.

Section 10. Power to borrow.

Section 11. Membership of the Majlis.

Section 12. Termination of appointments.

Section 13. Revocation of appointments.

Section 14. All appointments and revocations in the Gazette.

Section 15. Control by the President.

Section 16. Secretary.

Section 17. Attendance of non-members at meetings of the Majlis.

Section 18. Presiding over meetings.

Section 19. Quorum.

Section 20. Conduct of business.

Section 21. Summoning of meetings.
Section 22. Minutes.
Section 23. Order of business.
Section 24. Certified copies of resolution.
Section 25. Application for leave by the President and other members.
Section 26. Action in cases of urgency
Section 27. Committees.
Section 28. Delegation of duties and powers of the Majlis.
Section 29. Appointment of officers and servant of the Majlis.
Section 30. Secrecy.
Section 31. Public servant.
Section 32. Majlis may determine its own procedure.
PART III – THE APPOINTMENT OF THE MUFTI, AUTHORITY IN RELIGIOUS MATTERS, THE FATWA COMMITTEE AND FATWA RELATING TO MATTER OF NATIONAL INTEREST
Section 33. Appointment of Mufti and Deputy Mufti.
Section 34. Functions of the Mufti.
Section 35. Fatwa Committee.
Section 36. Power of the Fatwa Committee to prepare a fatwa.
Section 37. Procedure in making a fatwa.
Section 38. A fatwa published in the Gazette is binding.
Section 39. Amendment, modification or revocation of fatwa.
Section 40. Fatwa which relates to matters of national interest.
Section 41. Adoption of advice and recommendation of National Fatwa Committee.
Section 42. Request for opinion of Fatwa Committee.
Section 43. Qaul muktamad to be followed.
PART IV – SYARIAH COURTS
Section 44. Establishment of Syariah Courts.
Section 45. Appointment of Chief Syariah Judge.
Section 46. Appointment of Syariah Appeal Court Judges.
Section 47. Appointment of Syariah High Court Judges.
Section 48. Appointment of Syariah Subordinate Court Judges.
Section 49. Registrars.
Section 50. Jurisdiction of Syariah High Court.
Section 51. Jurisdiction of Syariah Subordinate Court.
Section 52. Appeals to Syariah High Court.
Section 53. Application for leave to appeal.
Section 54. Inheritance certificates.
Section 55. Supervisory and reversionary jurisdiction of Syariah High Court.

Section 56. Jurisdiction of Syariah Appeal Court.
Section 57. Supervisory and reversionary jurisdiction of Syariah Appeal Court.
Section 58. Composition of Syariah Appeal Court.
Section 59. Decision by the majority.
Section 60. Continuation of proceedings in Syariah Appeal Court notwithstanding absence of Judge.
Section 61. Open Court.
Section 62. Language.
Section 63. Jurisdiction does not extend to non-Muslims.
Section 64. Reciprocal action.
Section 65. Protection of Judges, Court officials, etc.
Section 66. Rules Committee of the Syariah Courts.
PART V – PROSECUTION AND REPRESENTATION
Section 67. Chief Syariah Prosecutor and Syariah Prosecutors.
Section 68. Religious Enforcement Officers.
Section 69. Peguam Syarie.
PART VI – FINANCIAL
Baitumal and Financial Procedure of the Majlis
Section 70. Establishment of Baitumal.
Section 71. Estimate of income and expenditure.
Section 72. Expenses of the Majlis.
Section 73. Bank accounts.
Section 74. Accounts and annual reports.
Zakat dan Fitrah
Section 75. Power to collect zakat and fitrah.
Section 76. Power to make regulations.
Section 77. Appeal.
Wakaf, Nazr and Trusts
Section 78. Majlis to be sole trustee of wakaf, nazr and trusts.
Section 79. Vesting of wakaf, nazr and trust property in Majlis.
Section 80. Restriction of creation of charitable trusts.
Section 81. Income from wakaf and nazr.
Section 82. Capital of wakaf and nazr.
Section 83. Construction of instrument on wakaf or nazr.
Section 84. Publication of list of wakaf, nazr and trust property.
PART VII – MOSQUES
Section 85. Majlis to be sole trustees of mosque and related land.
Section 86. Restriction on establishment of mosques and penalty.
Section 87. Establishment of mosques.
Section 88. Maintenance of mosque and their compounds.

A Section 89. Appointment of Pegawai Masjid.
Section 90. Tauliah of Pegawai Masjid.
Section 91. Tenure of officer of Pegawai Masjid.
Section 92. Control and direction of Pegawai Masjid.
Section 93. Jawatankuasa Kariah.
B Section 94. Exemption of mosques.
PART VIII – CHARITABLE COLLECTIONS
Section 95. Charitable collections.
PART IX – CONVERSION TO THE RELIGION OF ISLAM
C Section 96. Requirement for conversion to the religion of Islam.
Section 97. Moment of conversion to the religion of Islam.
Section 98. Duties and obligations of a muallaf.
Section 99. Registrar of Muallafs.
Section 100. Registration of Muallafs.
D Section 101. Certificate of Conversion to the Religion of Islam.
Section 102. Recognition of muallafs as Muslims.
Section 103. Determination whether a non-registered person is a muallaf.
Section 104. Offence of giving false information.
E Section 105. Power to make regulations.
Section 106. Capacity to convert to the religion of Islam.
PART X – RELIGIOUS EDUCATION
Section 107. Islamic Religious Teaching Supervisory Committee.
Section 108. Offence of teaching the religion of Islam or any aspect of the
F religion of Islam without a tauliah.
Section 109. Religion schools.
Section 110. Exemption.
PART XI – GENERAL
Section 111. General power to make regulations.
G Section 112. Repeal.
Section 113. Savings and transitional.

[76] Not all the sections in the said Enactment are protected by art. 121(1A) of the Federal Constitution and art. 121 reads as follows:

H 121(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may
I determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter **within the jurisdiction of the Syariah courts.** (emphasis added).

[77] The most relevant part where art. 121(1A) is applicable to Syariah Courts is Part IV. Part IV has 22 sections ie, ss. 44 to 66. Not all the 22 sections are relevant to art. 121(1A). It will also follow that other parts and sections in the Enactment will not be relevant to art. 121(1A) of the Federal Constitution. The distinction is not one relating to an apple and an orange but that of a marble and a pumpkin; when it relates to public law relief. Article 121(1A) does not permit the civil courts to deal with matters within the jurisdiction of the Syariah Courts. However, it does not exclude the jurisdiction of the civil courts' judicial review powers in the administrative decision of the State or its agencies and/or its officers. What the civil courts cannot do is to intervene in the lawful decision of the Syariah Courts made within its jurisdiction and not in excess of its jurisdiction. To put it in a simple term, not all the sections under the Enactment are protected by art. 121(1A). Cases which have not made out the distinction must be corrected by due process of law.

[78] In the instant case, the Pendaftar Muallaf's certificate of conversion has nothing to do with the **jurisdiction of the Syariah Court** and/or decision of the Syariah Court as asserted in art. 121(1A) of the Federal Constitution (emphasis added).

[79] The real question in this appeal is whether the Pendaftar Muallaf powers comes within the jurisdiction of the Syariah Court and in consequence is protected by art. 121(1A) of the Federal Constitution. If the answer is in the negative, the decision of the Pendaftar Muallaf is subject to judicial review. The question is the test for public law relief, in matters relating to civil and Syariah Court jurisdiction.

[80] The Memorandums of Appeal in respect of all the appeals read as follows:

(i) Appeal No: A-02-1826-08-2013

1. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila tidak mendengar dan memutuskan isu jurisdiction atau bidang kuasa sahaja terlebih dahulu sebelum mendengar "merit of the case". Supaya responden No 6 atau perayu dapat membuat rayuan berkaitan bidang kuasa (jurisdiction) terlebih dahulu sebelum kes ini didengar "on merit".
2. Yang Arif Pesuruhjaya Kehakiman yang bijaksana terkhilaf dari segi fakta dan undang-undang apabila gagal mentafsirkan maksud sebenar Artikel 12(4) Perlembagaan Persekutuan.

A

3. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah gagal mengambil kira bahawa telah ada kes-kes berkaitan Artikel 121 (1A) Perlembagaan Persekutuan berkaitan perkara bidang kuasa dimana keputusan mahkamah yang lebih tinggi eg keputusan Mahkamah Persekutuan adalah mengikat mahkamah yang lebih rendah termasuk Mahkamah Tinggi ini.

B

4. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah gagal mengambil kira bahawa anak-anak Perayu (Responden No 6) telah memeluk Agama Islam dan telah didaftarkan sebagai orang-orang yang telah memeluk agama Islam melalui Perayu sebagai Bapa yang telah memeluk Agama Islam terlebih dulu. oleh itu, untuk keluar

C

atau membatalkan sijil pemelukan Islam ini hendaklah atau seharusnya dibuat atau dalam bidangkuasa Mahkamah Syariah Negeri Perak Darul Ridzuan dan bukannya Mahkamah Tinggi Sivil.

5. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf mentafsirkan bahawa Mahkamah Syariah adalah mempunyai

D

kedudukan lebih rendah dibandingkan dengan kedudukan Mahkamah Sivil walaupun selepas pindaan Artikel 121 (1A) Perlembagaan Persekutuan.

6. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dalam mentafsirkan pemakaian undang-undang Hak Asasi Manusia (International Human Rights Laws) dan penggunaannya keatas

E

orang-orang yang beragama Islam di Negara kita Malaysia ini.

7. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dalam mentafsirkan kedudukan Artikel 3(1) Perlembagaan Persekutuan mengenai perkara agama Islam sebagai Agama Persekutuan seperti yang diperuntukkan dalam Perlembagaan

F

Malaysia.

(ii) Appeal No: A-01-304-08-2013

1. Bahawa Yang Arif Hakim terkhilaf dari segi fakta dan undang-undang apabila tidak mendengar dan memutuskan isu jurisdiction atau bidang kuasa sahaja terlebih dahulu sebelum mendengar "merit

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of the case'. Supaya Responden Pertama hingga Ketiga atau Perayu-Perayu dapat membuat rayuan berkaitan bidang kuasa (jurisdiction) terlebih dahulu sebelum kes ini didengar "on merit".

2. Bahawa Yang Arif Hakim terkhilaf dari segi fakta dan undang-undang apabila gagal mentafsirkan maksud sebenar Artikel 12(4)

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Perlembagaan Persekutuan.

3. Bahawa Yang Arif Hakim terkhilaf dari segi undang-undang apabila gagal mengambil kira bahawa telah ada kes-kes berkaitan Artikel 121(1A) Perlembagaan Persekutuan berkaitan perkara bidang kuasa di mana keputusan Mahkamah yang lebih tinggi seperti keputusan

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Mahkamah Persekutuan adalah mengikat Mahkamah yang lebih rendah termasuk Mahkamah Tinggi ini.

4. Bahawa Yang Arif Hakim terkhilaf dari segi undang-undang apabila gagal mengambil kira bahawa Muhamad Riduan bin Abdullah (Responden No. 6 dalam tindakan Mahkamah Tinggi Ipoh

Permohonan Untuk Semakan Kehakiman No. 25-10-2009 telah memeluk Agama Islam dan telah didaftarkan sebagai orang-orang yang telah memeluk Agama Islam melalui Muhamad Riduan bin Abdullah sebagai Bapa yang telah memeluk Agama Islam terlebih dulu. Oleh itu, untuk keluar atau membatalkan sijil pemelukan Islam ini hendaklah atau seharusnya dibuat atau dalam bidang kuasa Mahkamah Syariah Negeri Perak Darul Ridzuan dan bukannya Mahkamah Tinggi Sivil.

5. Bahawa Yang Arif Hakim terkhilaf dari segi undang-undang apabila gagal mentafsirkan bahawa Mahkamah Syariah adalah mempunyai kedudukan lebih rendah dibandingkan dengan kedudukan Mahkamah Sivil walaupun selepas pindaan Artikel 121(1A) Perlembagaan Persekutuan.
6. Bahawa Yang Arif Hakim terkhilaf dalam mentafsirkan pemakaian undang-undang Hak Asasi Manusia (International Human Rights Laws) dan penggunaannya ke atas orang-orang yang beragama Islam di Negara kita Malaysia ini.
7. Bahawa Yang Arif Hakim terkhilaf dalam mentafsirkan kedudukan Artikel 3(1) Perlembagaan Persekutuan mengenai perkara Agama Islam sebagai Agama Persekutuan seperti yang diperuntukkan dalam Perlembagaan Malaysia.

(iii) Appeal No: A-01-316-09-2013

1. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan permohonan semakan kehakiman Responden terhadap Perayu-Perayu.
2. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila memutuskan bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar permohonan semakan kehakiman ini sedangkan hal perkara permohonan ini secara efektifnya adalah hal perkara yang berada di bawah bidang kuasa Mahkamah Syariah.
3. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila tersalah arah dirinya dalam memakai keputusan Mahkamah Persekutuan kes *Latifah Mat Zin v. Rosmawati binti Sharibun & Anor* [2007] 5 MLJ 101 mengenai isu bidang kuasa Mahkamah Syariah terhadap pihak bukan Islam.
4. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila sama ada secara nyata atau tersirat memakai 'remedy prayed for approach' dan bukan 'subject matter approach' dalam meneliti dan menghakimi permohonan semakan kehakiman Responden ini.
5. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila mengenepikan tafsiran 'parent' di bawah Artikel 12 Perlembagaan Persekutuan yang mempunyai konotasi 'singular' sebagai mana yang diputuskan oleh Mahkamah Persekutuan di dalam kes *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1.

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6. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila merujuk kepada Guardianship of Infants Act 1961 sebagai salah satu asas keputusannya sedangkan akta tersebut secara nyata tidak terpakai kepada orang-orang Islam.

7. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila memutuskan secara pramatang bahawa terdapatnya perlanggaran rukun keadilan asasi terhadap Responden dan anak-anaknya dalam pengislaman anak-anaknya sedangkan isu sedemikian sepatutnya diadil dan diputuskan oleh Mahkamah Syariah berdasarkan Hukum Syarak.

8. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila menerima pakai dan mengaplikasi undang-undang antarabangsa UNDHR, CRC dan CEDAW secara berlebihan dan/atau berlawanan dengan prinsip undang-undang di dalam negara dalam mengadili dan menghakimi permohonan semakan kehakiman Responden ini.

9. Yang Arif Pesuruhjaya Kehakiman yang bijaksana telah terkhilaf dari segi fakta dan undang-undang apabila membuat keputusan memihak kepada Responden yang mana ia bertentangan dengan fakta dan/atau keterangan dan peruntukan undang-undang atau prinsip undang-undang yang sepatutnya diambil kira secara keseluruhan.

Brief Facts

[81] The appellant, Pathmanathan (husband) and the respondent, Indira Gandhi (wife) were married under the Civil Law Act 1976 and had three children from the marriage. The eldest daughter being 18 years old at the time of the hearing of this appeal renders the status of the eldest daughter in this appeal, purportedly academic. All parties have agreed that the issue is only in relation to the other two children.

[82] The husband converted to Islam on 11 March 2009 and subsequently on 8 April 2009 had obtained an *ex parte* interim custody order for all the three children and later a permanent custody order from the Syariah Court on 29 September 2009 notwithstanding the clear provision of s. 50 of the Perak Enactment, only gives jurisdiction to the Syariah Court in its civil jurisdiction to hear matters when the proceedings are related to Muslims. However, the appellant obtained the order from the Syariah Court against a non-Muslim which the Syariah Court has no jurisdiction at all.

[83] The conduct of the appellant obtaining an order from the Syariah Court against a non-Muslim is a mystery relating to jurisprudence and is not a subject matter of the judicial review application before the High Court. However, the parties on the frolic of their own and the respondent by placing alternative prayers had confused the learned trial judge with convoluted arguments resulting in a convoluted judgment which in my view is unnecessary, taking into consideration the simple and basic issues involved in this case. The said judgment is reported in MLJ citation – *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 7 CLJ 82; [2013] 5 MLJ 552.

Jurisprudence Relating To Parliamentary And Constitutional Supremacy And Constitutional Oath

[84] To explain to the litigant why I say that parties have resorted to convoluted arguments and jurisprudence which had resulted in convoluted judgment, it is all because of lack of appreciation relating to:

(i) concept of parliamentary and constitutional supremacy;

(ii) rule of law relating to parliamentary and constitutional supremacy;

(iii) the oath of judge in a country like England which practices parliamentary supremacy; and

(iv) the oath of a judge in countries like India and Malaysia which practices constitutional supremacy.

(v) relying on judgment which has not applied the right version of the rule of law.

[85] It is well settled that Malaysia, like India, is a country which has a written Constitution and in consequence the Constitution is supreme. Executive decision as well as legislative action are subject to the framework of the Constitution. The three pillars, the Executive, Legislature and the Judiciary have taken an oath to preserve, protect and defend the Constitution. By the oath of office they are not allowed to make any arbitrary decision in any of their decision-making process. They are, by the sacrosanct oath of office, had undertaken to protect the fundamental rights enshrined in the Federal Constitution. They can only do so if they apply the rule of law relating to constitutional supremacy. Ironically what has transpired in Malaysia is that some of the courts' decisions are only based on constitutional supremacy and a large majority of the decision which affects the fundamental rights are based on parliamentary supremacy. Those important decisions which was based on the jurisprudence relating to parliamentary supremacy appears not to have inspired confidence in the judicial decision-making process and the cause of convoluted jurisprudence inconsistent with the oath of office. It all started as a result of the infamous case of *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, where the Supreme Court by majority had ruled that a taxpayer had no *locus standi* to question the policy of the Government and the court by majority in that case said it will not interfere with the policy of the Government.

[86] The decision had a damaging effect on all subsequent decisions relating to fundamental rights. For it must be noted that the effect of *Lim Kit Siang*'s case in practical terms compromised the doctrine of accountability, transparency and good governance and the check and balance to control arbitrariness by public decision makers such as the Executive and Legislature. Arbitrariness is not part of our jurisprudence as propounded by

HRH Raja Azlan Shah in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, where HRH observed:

> Unfettered discretion is a contradiction in terms. … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

[87] In jurisprudential terms when you take into consideration the distinction in oath of office of an English and Malaysian judge, the anchor principles advocated in the case of *Sri Lempah* demolishes the non-justiciability doctrine and replaces it with the concept of arbitrariness. That is to say in an application for judicial review of (a) Executive decision; or (b) Legislation; or (c) Constitutional amendment; or (d) Policy decision of the Government, the public decision maker's decision must not be arbitrary and/or impinge on the concept of arbitrariness. If it does, according to HRH Raja Azlan Shah, there is dictatorship. I will explain this further in my judgment.

[88] The test propounded by HRH Raja Azlan Shah is simple and straightforward and it applies to all public decision makers which will include the three pillars. The failure of the courts to strictly follow the test will compromise the concept of accountability, transparency and good governance, thereby compromising the rule of law or worst still make it sterile.

[89] The jurisprudential effect of *Lim Kit Siang*'s case is seen in the instant case. In the instant case, the respondent is arguing the case based on constitutional supremacy to sustain her fundamental rights. However, the appellants are arguing the case based on parliamentary supremacy without realising that the respondent's fundamental rights are being trampled by such arguments. The learned judge correctly in consequence of constitutional oath to preserve, protect and defend the constitution had engaged the jurisprudence relating to constitutional supremacy. The instant case in actual fact is a clash in jurisprudence relating to parliamentary and constitutional supremacy. In consequence, the arguments and reasons for the judgments have become convoluted not only in this case but also many other cases relating to public law. I will, in simple terms, explain the relevant jurisprudence as follows:

(a) Jurists Have Not Been Adequately Trained By The British To Administer The Written Constitution

The distinction, concept, jurisdiction and power of courts in the regime of parliamentary supremacy and constitutional supremacy was eloquently summarised by the learned author, Peter Leyland, in his book *'The Constitution of the United Kingdom'*, (2nd edn), 2012 at p. 50 as follows:

> A further crucially important point about legal sovereignty which will be relevant in relation to many issues under discussion in this book is that this principle determines the relationship between Parliament and the courts. It means that although the courts have an interpretative function in regard to the application of legislation, it is Parliament, and not the courts, which has the final word in determining the law. This is markedly different from most codified constitutions. For example, in the United States, the Supreme Court held in *Marbury v. Madison* [1803] 1 Cranch 137, that it could determine whether laws passed by Congress and the President were in conformity with the constitution, permitting judicial review of constitutional powers. The situation in the United States is that ultimately there is judicial rather than legislative supremacy. (emphasis added.)

Notwithstanding the above distinction, the British failed to instruct or sufficiently distinguish this separation when the colonies were given independence with a written constitution. India had a problem when they applied the rule of law relating to parliamentary supremacy to administer the Constitution. They have overcome that glitch by introducing the 'basic structure jurisprudence' as part of the rule of law. Malaysia has a problem with the rule of law and administration of the Constitution. That problem has been highlighted by a press statement recently by the fourth pillar. That problem in my view can be overcome by creating greater awareness of the constitutional oath jurisprudence to all public decision makers and the court strictly enforcing the jurisprudence in all aspect of public law challenges. In simple terms, the judiciary is only required to arrest arbitrariness and nothing more. Arresting arbitrariness does not mean interfering with the doctrine of separation of powers. The distinction is like that of an apple and an orange. In addition, when the executive decision or legislation, or constitutional amendment is quashed or struck out, it does not mean the Executive or Legislature cannot review their decision and/or legislate to confirm with the rule of law and the constitution.

An important impediment in law and jurisprudence to protect fundamental rights as embodied in the Constitution is that the judges and jurists were never trained to administer the Constitution within the norms of constitutional supremacy. The training received from the British which largely continues was the rule of law related to parliamentary supremacy. That does not contribute to nurturing fundamental rights in colonies where the mass are 'uninformed' as opposed to informed members of the public. For example, it is doubtful whether unjust laws and unjust decisions will find a place in

England where the society is largely well informed. The same may not be the case in colonies once administered by the British. In fact, there was a different set of legislation employed by the British in England as opposed to that in the colonies though the administration of the judicial principle appeared to be the same. That is to say, it is not how the English judges decide but it is actually what was provided in the legislation and/or the common law and the nature of jurisprudence they employ to tackle the problem. If the legislation does not provide for fundamental rights, then the English judges by judicial activism cannot do so. That is their conventional limit. Though judicial activism is shunned in England, as the judges are by oath of office subservient to the legislation, on the contrary 'Judicial Dynamism' is expected of judges in a country with a written constitution to protect fundamental rights within the constitutional framework; more so when they have taken an oath to preserve, protect and defend the Constitution. What is shunned in England as judicial activism is a constitutional obligation for judges here to meet the legitimate public expectation as per the Constitution.

A large majority of jurists here and elsewhere have not taken note of the difference in the oath of office under the Constitution when they criticise judicial dynamism as judicial activism.

(b) Different Versions Of Rule Of Law

The version of rule of law applied in parliamentary and constitutional supremacy nations are not the same. To put it in simple terms:

(i) the doctrine of parliamentary supremacy as practiced in England takes the position that Parliament knows best what is good for the people. The Judiciary must give effect to Parliament's will. Judges take oath to be subservient to the legislation. Judicial activism is not permissible. Rule of law requires the Judiciary to be subservient to the legislation and show deference to the policy of the Government. Parliament and/or Executive by policy can choose not to uphold the concept of accountability, transparency and good governance. The courts cannot go against the will of Parliament and must give great deference to the policy of the Government.

(ii) the doctrine of constitutional supremacy takes the position that Parliament must be guided by the Constitution. The Judiciary must make sure that Parliament legislates according to the constitutional framework and all its agencies administer the legislation according to the rule of law related to constitutional supremacy. For this purpose the judiciary takes an oath to preserve, protect and defend the Constitution. Judges are expected by the public to demonstrate 'judicial dynamism' to protect the Constitution as well as protect fundamental rights. Parliament as well as the Executive must uphold the concept of accountability, transparency and good governance as failure to do so will breach the constitutional framework. Judges by oath of office are

entrusted to ensure the constitutional framework is not breached. Rule of law requires the Judiciary to be subservient to the Constitution and condone policy of the Government, provided it does not breach the constitutional framework or the doctrine of accountability, transparency and good governance. Towards this end, the 'Rukun Negara' was introduced to ensure all the pillars of the Constitution as well as the public are beholden to: (a) Belief in God; (b) Loyalty to the King and country; and (c) Supremacy of the Constitution; (d) Rule of Law; (e) Courtesy and morality.

(c) What Version Of The Rule Of Law?

The Judiciary has a greater role to play and to sustain the rule of law. The argument now is which version of the rule of law? The rule of law relating to parliamentary or constitutional supremacy? Professor Andrew Harding, in essence, says 'the right version of the rule of law is not applied here'.

It is important to appreciate the right version of the rule of law and its administration plays an important role to rest a successful nation. I will explain this in lay terms as follows:

(i) the right version of the rule of law will turn a desert into an oasis;

(ii) the wrong version of the rule of law will turn an oasis to a desert;

(iii) the role of the courts under the Constitution is to apply the right version of the rule of law to ensure that an oasis is not turned to a desert;

(iv) under the Constitution, the court's role is not to turn a desert into an oasis. That role to turn a desert into an oasis rests with the other pillars and not the courts. The court's role is limited, to that extent. These separate roles are often referred to as separation of powers. However, when the courts' decision paves way for an oasis to be turned into a desert that may be referred to as fusion of powers. Fusion of powers is an anathema to the constitutional framework and will impinge on fundamental rights and justice.

The jurisprudence involved in administration of justice in both of these concepts namely parliamentary and constitutional supremacy is not one and the same. That is to say, when a judge or coram applies the rule of law relating to parliamentary supremacy in India or Malaysia, the decision may not be the same as that of another judge or coram who applies the rule of law relating to constitutional supremacy. In relation to fundamental rights, a decision based on parliamentary supremacy may not inspire confidence on the affected populace when there is a legitimate expectation that the judiciary by its oath of office would act to protect the fundamental rights provided under the Constitution. This dilemma was felt in India in the early post-independence days when the courts were relying on the rule of law relating to parliamentary supremacy in interpreting the legislation and/or the Constitution. Subsequently, the Indian judges in my view realised the

shortcomings and inadequate jurisprudence to administer the Constitution and to overcome that, they came out with an innovative jurisprudence called the 'Basic Structure' jurisprudence to ensure Parliament does not interfere with the constitutional framework and also to sustain fundamental rights to uphold justice. Basic structure jurisprudence is well documented by Justice V Dhanapalan (retired), Judge of the High Court of Madras in his recent book titled *'Basic Structure of the Indian Constitution – An Overview"* (2015). It is a must read for all jurists who are committed to justice and the Constitution.

(d) Parliamentary Supremacy

The doctrine of parliamentary supremacy is feudalistic in nature. It rests the power of the sovereign, or the King as the case may be in England, on the Parliament. It is just one step near to dictatorship when the majority of the elected Members of Parliament become self-serving and the role of the court even in that instance is to serve self-serving legislation and not the public. In consequence, English judges cannot strike down legislation even if Parliament enacts unjust laws or compromises its sovereignty by treaties and or sells off its territory to other States or private persons, etc by way of legislation or through the Executive giving out largesse to nominees. If an issue is raised in court, the judges in England may just say it is the policy of the Government and that they are not adequately equipped to interfere. When it relates to private rights, the English Judiciary would receive 'expert evidence' if necessary, on the issue which would not be the case for public law relief. It will appear that they employ double standards of reasoning in public and private law field. However, such an approach is an accepted norm and justified within the framework of parliamentary supremacy though such an approach may be illegal or irrational in the '*Wednesbury*' sense when employed in a nation which has subscribed to constitutional supremacy.

(e) Constitutional Supremacy

In the regime of parliamentary supremacy, the public will have no recourse when the majority of the Parliamentarians abuse the system as there are no checks and balances on the might of parliament in that system. In consequence, the founding fathers of the Indian Constitution as well as the Malaysian Constitution, rejected the concept of parliamentary supremacy and accepted the doctrine of constitutional supremacy like that of US, and ensured by the constitutional oath of office of the Legislature, Executive and the judiciary, that they are beholden to preserve, protect and defend the constitution. The Judiciary was entrusted as the supreme policeman as well as the judge of the Constitution to supervise all the constitutional functionaries to ensure that the rule of law which is an essential jurisprudence to protect the Constitution is maintained. The Government in Malaysia under the constitutional framework means all the pillars as each and every pillar has a specific role to play to preserve, protect and defend the Constitution. That is not the case in England and the Judiciary is the weaker arm of the Government and has no role to play in governing the nation *per*

se save to be subservient to Parliament and ensure the rule of law is sustained. That is not the case here or in India as per the Constitution and in Malaysia particularly because of the constitutional judicial power to sustain rule of law endowed to the fourth pillar through the oath of office of HRH Yang di-Pertuan Agong.

The Judiciary *per se* here is not the weaker arm but the supreme policing arm of the Constitution. In my view, HRH is placed as the constitutional guardian of the rule of law and order in the country. This is reflected in the oath of office of HRH. The relevant part of the constitutional oath of His Majesty pursuant to art. 37(1) reads as follows:

> ... and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, We do solemnly and truly declare that We shall at all-time protect the Religion of Islam and **uphold the rules of law and order in the Country.** (emphasis added)

The shortcoming of the doctrine of constitutional supremacy is that if the judiciary becomes a compliant judiciary and fails to uphold the jurisprudence relating to constitutional supremacy and leans towards parliamentary supremacy, then the protection to the public would be lost and it will result in a step nearer to dictatorship. Once the protection to the public is lost, then there is no 'separation of powers' which is integral to constitutional supremacy. The result would be 'fusion of powers' reflective of dictatorial regime and the demise of the Constitution. The founding fathers of the Indian Constitution in my view arguably were not vigilant to provide any mechanism to arrest a compliant judiciary. In India, it will appear that the 'free and independent press' stands as a check and balance to arrest the dilatory conduct of the three pillars. Not all countries which has subscribed to the Constitution has a 'free and independent press'.

(f) Fourth Pillar

The founding fathers of the Malaysian Constitution were vigilant and they provided a fourth pillar and in my view the most powerful pillar to protect the rule of law and order in the country, which was not the case in India. The fourth pillar is none other than their Royal Highness (the Rulers) and this is reflected in the constitutional oath of office of the HRH Yang di-Pertuan Agong. To perform the oath, His Majesty is made the Supreme Commander of the Armed Forces with no executive shackles and also placed as the 'Head' of the Armed Forces Council. This is not the case in India.

It is extremely disheartening to note that most Malaysian jurists arguably have not realised this distinction and instead argue the role of Rulers is only ceremonial in nature as is the case of the President of India. The Malaysian jurists appear to have been highly influenced by the writings from India, in relation to the role of the President of India.

(g) Rule Of Law And Reasonableness

One of the important facets of rule of law is the keyword 'reasonableness'. This word runs through all forms of executive decisions, legislation and the Constitution. The antithesis and/or anathema to rule of law is arbitrariness. Any form of arbitrariness in decision-making process or legislation-making process and/or constitutional amending process must not subscribe to arbitrariness. Any jurists who attempts to say reasonableness is not a component of the Constitution or the rule of law in my view, will only articulate 'comical jurisprudence', a matter to be shunned at. The comical jurisprudence if not checked promptly by the relevant pillars, may lead to the demise of the Constitution and/or impinge on fundamental rights and justice.

The judiciary has a constitutional role by oath of office to arrest arbitrariness failing which it has been placed in the hands of the fourth pillar, to ensure the country is ruled by rule of law and not rule by law or by any judicial proposition to imply that the judiciary knows best what is good for the country. Such judicial proposition is illegal in the '*Wednesbury*' sense, both under the jurisprudence relating to parliamentary as well as constitutional supremacy. Courts cannot legislate; at the most they can give guidance or directions only.

In my view and based on authorities from respectable jurisdiction, under the jurisprudence relating to constitutional supremacy and oath of office:

(i) executive decision cannot be arbitrary;

(ii) formulation of legislation cannot be arbitrary and the legislation, even if made according to the provision of law and/or Constitution, must pass the strict test of reasonableness and proportionality, failing which it will be caught by the doctrine of arbitrariness as per decided cases;

(iii) Constitutional amendment cannot be arbitrarily done. Even if the constitutional amendment is valid, it must pass the strict acid test of reasonableness and proportionality.

(iv) in the Malaysian context, the Legislature, Executive and the Judiciary cannot make arbitrary decision as the decision may be subjected to the scrutiny of the fourth pillar which is the supreme pillar and arbiter to maintain the rule of law and order in the country under the Constitution. This is not the case in India if the Judiciary becomes a compliant Judiciary as there is no fourth pillar to check arbitrariness.

I do not wish to say much in respect of the jurisprudence relating to rule of law save to say that any decision by the Executive, Legislature or Judiciary must not subscribe to the concept of illegality, irrationality, procedural impropriety. The decision must also pass the test of reasonableness and proportionality as advocated in many of the English as well as the Indian cases. On my part, I have dealt with the concepts in detail in more than ten

judgments in particular the jurisprudence relating to constitutional oath of office. They are as follows: (i) *Nik Noorhafizi bin Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273; (ii) *Nik Nazmi bin Nik Ahmad v. PP* [2014] 4 CLJ 944; (iii) *Teh Guat Hong lwn. Perbadanan Tabung Pendidikan Tinggi Nasional* [2013] 1 LNS 1465; [2015] 3 AMR 35; (iv) *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors* [2007] 5 MLJ 441.

(h) Judicial Review

Judicial review is the process where legislative and executive actions are reviewed by the Judiciary upon a complaint of the public that his or their rights have been infringed by the Legislature and/or Executive or inferior tribunal, etc. Judicial review parameters of the court within the jurisprudence of parliamentary supremacy are limited. For example, it is trite that English judges cannot review a legislation and strike it down wholly or partly unless it is a subsidiary legislation. English judges can review any form of executive decision but will be slow in doing so if it is related to policy of the Government.

Judicial review parameters of the court under the doctrine of constitutional supremacy are wide. The Judiciary is empowered to review (a) executive decision; (b) legislation; (c) any constitutional amendments; (d) any policy decision. The methodology they can employ in any of the review process is principally based on the jurisprudence that the executive and/or legislative decisions must conform to the constitutional framework and the decision-making process must not be arbitrary. For example, if a legislation or constitutional amendment or policy, violates the constitutional framework, it will be struck down as of right based on *ultra vires* doctrine. If the *ultra vires* doctrine is not applicable, the court may employ the concept relating to illegality, irrationality, procedural impropriety, reasonableness and proportionality to check the decision making-process of the Executive. However, where it relates to legislative decisions concerning Legislature and/or constitutional amendment, the court in India applies the doctrine of basic structure jurisprudence to strike down the legislation and/or constitutional amendment. What the courts have not done is to apply the constitutional oath doctrine to strike down the legislative and/or constitutional amendment if the Legislature has been found to have acted arbitrarily.

That is to say, the court, to sustain the rule of law cannot allow arbitrariness to creep in any executive or legislative or constitutional amendment or policy-making process. In essence, under the doctrine of constitutional oath the Legislature or Executive or Judiciary cannot make any arbitrary decision. For example, (i) if the executives decision is arbitrary, it ought to be quashed; (ii) if it is shown that the legislative action in enacting the legislation or the constitutional amendment was arbitrary, it ought to be struck down even if the *ultra vires* doctrine is not applicable; (iii) if the policy formulated is arbitrary it may be struck down. That is to say, arbitrariness

A makes the decision of the executive and/or legislative action a nullity *ab initio*. An *ultra vires* act of the Executive or Legislature *viz-a-viz* the Constitution makes the whole decision or legislation or Constitutional amendment or policy illegal.

In the Malaysian context, where the Executive or Legislature or Judiciary
B makes any arbitrary decision or conduct themselves arbitrarily even in Parliament that too by Parliamentarians that will be inconsistent with the rule of law, and/or constitutional framework. The English courts have no such powers to intervene in the affairs of Parliament and parliamentary practice there is a matter largely of convention. Parliamentary practice based
C on Constitution is subject to rule of law. That is not the case in England. The oath of office of the HRH gives constitutional, judicial power to HRH to arrest any form of breach of rule of law as judicial power to do so is entrenched in the oath of office of HRH. Employment of procedure for that is purely an administrative exercise based on established principles of natural
D justice. Just because there is no procedure it does not mean the constitutional oath with the constitutional, judicial power was formulated in vain. The constitutional, judicial power of HRH pursuant to the constitutional oath is unique to the Malaysian Constitution and such powers have never been exercised in full force from the inception of the Constitution save as to the
E recent press statement of the HRH the Rulers on rule of law. In consequence, there is hardly any literature on the subject in India or globally, though a fair minded jurist having informed of the difference will concur on the role of the fourth pillar.

(i) Rule Of Law And Rule By Law

F Rule of law is a generic term and in consequence no one yet has been able to define its parameters. For example, there may be presence of rule of law in a communist, socialist, democratic, Syariah regime, etc. The real question here is what version of rule of law need to be applied to administer a written Constitution. One important aspect on the selection process is that any
G principles of law which does not promote transparency, accountability and good governance and if also the application of that principle, leads to endemic corruption, cannot be the rule of law envisaged in the Constitution or Rukun Negara. It is one relating to common sense approach and as Lord Denning often says if common sense is not applied in the administration of
H justice, it would not lead to justice or words to that effect.

I do not wish to elaborate on the parameters of rule of law save to say it is now an accepted norm that law as per the constitutional framework should govern a nation, as opposed to governed by arbitrary decisions or legislation and/or constitutional amendments. Rule by law is an antithesis to rule of law
I and is now seen as anathema in democratic country more so in countries which are subject to a constitutional framework when the decision of the Executive, Legislature and the Judiciary is tainted with arbitrariness. The line may appear to be thin but the distinction is like that of comparing a

marble to the size of a pumpkin and the distinction is not like an apple to an orange. Rule of law paves the way for progress of democratic nations and nips corruption in the bud and rule by law leads to destruction of the nation when by its application corruption sets in. The ultimate result is that it will compromise fundamental rights as corruption often leads to squandering of national assets or its revenue and hits the poor the most. In *Nik Noorhafizi bin Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273, the importance of rule of law was emphasised as follows:

(d) It is pertinent to note that a compliant judiciary or bench cannot stand as a bulwark of liberty. A compliant judiciary or bench is one which does not want to subscribe to its sacrosanct oath, and Rukun Negara and does not believe in Rule of Law and does not want to protect the constitution and abrogates its role by saying that it has no judicial power and paves way for Rule by Law. It is for the public through Parliament or His Royal Highness (HRH), the Rulers, in particular the Yang Di-Pertuan Agong (His Majesty) to initiate the steps to arrest the progress of a compliant judiciary and ensure that the judiciary is independent to protect the constitution and sustain the Rule of Law. A compliant judiciary will directly and/or indirectly promote all form of vice which in all likelihood will destabilise the nation as well as harmony and security. In *Lim Kit Siang v. Dato' Seri Dr. Mahathir Mohamad* [1987] 1 CLJ 40; [1987] CLJ (Rep) 168; [1987] 1 MLJ 383 the Supreme Court had this to say:

> When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

(e) Our founding fathers have framed the constitution by giving the courts absolute jurisdiction and power to police and adjudicate on legislation as well as executive decisions in the right perspective. The important distinction is that in UK the court is not empowered to police legislation and declare them as *ultra vires* of their uncodified constitution though by way of interpretation of statute or judicial review they are permitted to declare the decision of executive was in breach of their uncodified constitution, etc. (see Peter Leyland:

2012, '*The Constitution of United Kingdom*'). In addition our founding fathers to protect the constitution and as a further security to ensure the rule of law and order in the country is observed by all parties inclusive of the three pillars have entrusted the force and might of the state exclusively to His Majesty, by entrusting His Majesty as the Supreme Commander of the Armed Forces without any executive shackles as is placed in other countries on the Heads of the country such as UK (Queen) or India (President). In essence, if the pillar or pillars fail in their obligation the public are entitled to lodge a complaint petition with His Majesty, who is obliged pursuant to the Constitution and Constitutional Oath to independently adjudicate upon the complaint (without any executive shackles). And His Majesty to ensure order in the country and also as the last bastion within the constitutional framework is constitutionally bound to consider the problem, assess the consequence, evaluate alternative and if need be advance the remedy. No pillar can abrogate its role and constitutional oath and the judiciary is no exception and the judiciary without jurisprudence simply cannot say they have no judicial power. All pillars inclusive of constitutional functionaries are answerable to His Majesty more so when a complaint is lodged with His Majesty. Thus, our founding fathers of the constitution unlike the Indian Constitution have placed full responsibility in respect of 'Order in the Country' to His Majesty and His Majesty has a supreme role to play in policing the pillars as well as other constitutional functionaries, subject only to the constitutional framework and limitations. The relevant part of the constitutional oath of His Majesty pursuant to art. 37(1) reads as follows:

> ... and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, we do solemnly and truly declare that We shall at all time protect the Religion of Islam and uphold the rules of law and order in the country. (emphasis added)

(j) Constitutional Oath

Full compliance of constitutional oath of office guarantees rule of law and paves way for justice and economic progress.

The locus classic case which has compromised the oath of office of a judge and public law challenges and/or relief is the majority decision in the case of *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, where, by the application of jurisprudence relating to parliamentary supremacy, the court held the respondent, a Parliamentarian, had no *locus standi* to question the granting of largesse by the Government to a nominee company. In addition, the majority went to decide that the courts will not interfere with the policy of the Government. The irony of the case in our judicial history is that a three

member panel of the Supreme Court related to the facts of that case had previously granted an interlocutory injunction recognising Parliamentarian Lim had *locus standi* and the subsequent decision in unprecedented manner in law and practice went to hold that Lim had no *locus standi*. *Lim*'s case within the parameters of judicial precedent as well as court practice arguably and crudely is seen as an unconstitutional decision delivered by the majority advocating equally an unconstitutional jurisprudence within the constitutional framework. I will explain this further.

Lim's case was related to the giving of Government contracts without going through a tender process and/or not giving the tender to the highest bidder, etc. Basically, the issue was one relating to transparency, accountability and good governance which must be seen as the soul of rule of law and the Constitution. The minority decision was based on the doctrine of constitutional supremacy where the judges held that the appellant had *locus standi*. The consequential result of the case led to Malaysian courts, far and large, applying doctrine of parliamentary supremacy in decision-making process when it relates to substantial policy of the Government. Such an approach often did not inspire confidence among the critics though the majority of the judiciary was rightly or wrongly said to be following the rule of law as per judicial precedent. The irony of the decision is that the previous panel and the two dissenting judges, totalling five members of the Supreme Court in all had held Lim had *locus standi*. However, the three who said that Lim had no *locus standi* had been followed in subsequent cases based on *'stare decisis'* principle. That is to say, the court was observing the rule of law but not based on constitutional supremacy but parliamentary supremacy, that too when total majority of five members of the two corams of the Supreme Court have decided arguably based on the rule of law relating to constitutional supremacy, and only three judges have decided by applying the rule of law relating to parliamentary supremacy. *Lim*'s case had plagued the relief relating to fundamental rights and justice and is said to be continuing and is shamelessly impinging the rule of law and the Constitution, substantially affecting justice.

Learned Professor Andrew Harding had summarised, *Lim*'s case as follows:

> In 1988 the case of *Government of Malaysia v. Lim Kit Siang* [1988] 1 MLJ 50, appeared to draw a line under all the developments so far in administrative law in Malaysia, and to say that the law would develop no further. The case was also one of crucial importance politically; it was therefore a real test of the limits of judicial review. For these reasons it is worth considering in some detail.
>
> The Leader of the Opposition, Lim Kit Siang, who was also an MP, a State Assemblyman, a taxpayer and a road user, sued for a declaration that a letter of intent given to a company (UEM), by the Government for the privatisation of the construction of Malaysia's North-South Highway was invalid, and for an injunction to restrain UEM from signing any contract pursuant to the letter of intent. His main allegation was that the

A ministers involved in the Cabinet decision to grant the contract were guilty of criminally corrupt practices, in that they were biased in favour of UEM because it belonged to UMNO. He also alleged that the Government had rejected the tenders of two rival companies which were lower than UEM's, so that the Government had uneconomically committed huge expenditure from public funds.

B Lim's motion for an interim injunction, a preliminary issue, was granted by the Supreme Court, sitting in a bench of three judges. The Government applied for the interim injunction to be set aside on the ground of lack of standing, and this application was also heard by the Supreme Court, which, by the narrowest possible margin, three to two, C and, exceptionally, overruling its own previous decision in the same case, decided in favour of the Government.

The majority held that, where a statute created a criminal offence but no civil remedy, the AG was the guardian of the public interest and it was he alone who could enforce compliance with the law. No other person D could, without the consent of the AG, bring an action of this kind (for an injunction in aid of enforcement of the criminal law) unless some private right of his was being interfered with, or he suffered special damage peculiar to himself. As a politician the respondent's remedy lay with Parliament and the electorate. In the course of their judgments the majority followed the law as laid down by the House of Lords before the E statutory reform of English administrative law remedies in 1981, and held that later English developments were inapplicable.

Seah and Abdoolcader SCJJ (dissenting) held that standing was a rule of practice and procedure to be laid down by the judges in the public interest, and was liable to be altered by the judges to suit the changing times. The F respondent as an MP had brought the suit *bona fide* alleging Government wrongdoing in the award of the contract to UEM which would result in the illegal spending of billions of dollars. He therefore had a real interest in the subject-matter of the suit, which was not to enforce the criminal law but was a public interest suit calling for judicial review of the legality of proposed executive action.

G The failure of the majority to develop Malaysian law in this case is unfortunate. The reliance on the AG as the guardian of the public interest is difficult to understand: it is hardly likely that the AG would take such action against his political masters. The identity of the litigant is really an irrelevant issue when the courts consider serious allegations of abuse of power. On the other hand the case was political dynamite: if Lim had H succeeded in his getting his claim into court, the credibility of the Government might have been seriously eroded.

Before we conclude too swiftly that this case marks the end of the development of the rules of standing in Malaysia, it is worth noting:

I (i) that the case lays down a rule which is very narrow in scope;

(ii) that it is also contrary to the trend of decisions both in Malaysia and in the Commonwealth;

(iii) that the decision is not necessarily correct, as is evidenced by the strong dissenting judgments and the decision overruled;

(iv) that earlier decisions had opened up the standing rules; and

(v) that the case was one which affected the very survival of the government in power.

Learned Professor's critical view on the decision of the Malaysian courts in public law in particular administrative law field reads as follows:

> The problem of administrative law, stated earlier in this Chapter, has not been given a clear answer by the Malaysian judiciary. However, one can attempt to estimate the results of their work.

Malaysian judges clearly feel happier with judicial review of administrative action than with judicial review of legislation. In this respect they reflect faithfully their common law background. In the absence of supporting control mechanisms within the administration they have effectively constructed a system of judicial review which is becoming a popular vehicle for complaints against the administration. This applies mainly to procedural issues, but the cases are by no means confined to procedural issues. Judicial review applications are now increasing rapidly year on year, as Table 2 shows.

Table 2: Judicial Review Cases, High Court, Kuala Lumpur, 1987-1994

[source: Registrar, High Court, Kuala Lumpur]

Year	Registered	Leave	Trial	SI
1987	62	56	46	25
1988	77	76	72	41
1989	42	37	25	15
1990	54	42	35	16
1991	52	19	14	0
1992	34	19	17	2
1993	42	14	13	1
1994	87	83	83	25

The statistics indicate very clearly that judicial review shrank to almost a trickle during a very difficult period for the judiciary (1989-93), but the situation in 1994 and resembles that of the pre-1988 period.[120]

At the same time the decisions evince a distaste for involvement in politically charged cases, especially where policies crucial to national development are involved. It is also true that there are inconsistencies of approach. To some extent, however, this is inevitable, given the subjective and variegated nature of judicial review.

A Judicial review appears to have survived and flourished in conditions very different from those of England, where most of the doctrines developed in Malaysia originated. Given the pace of economic development and the increasing importance and sophistication of regulatory and adjudicative mechanisms in Malaysian government, and the maturity too of the interests and arguments involved in judicial review cases, it seems likely
B that judicial review will continue to grow, and although that growth will probably continue to be unobtrusive, the value of its effects is, and will continue to be, apparent.

What is perhaps most needed to bolster the judicial developments is a corresponding willingness on the part of the executive and the legislature
C to respond to public need and create more extra-judicial methods of challenging administrative decisions. Judicial review is a necessary but not sufficient condition for public confidence that the rights of individuals in the administrative process will be properly protected. The present situation resembles a skirmish over the no man's land between executive and judicial power. A much better situation would be one in which both
D branches of the state co-operated in building up a much more systematic and available process of review of administrative actions according to principles which both regard as legitimate.

The former Federal Court Judge and constitutional jurisprudence expert who was instrumental in anchoring basic structure jurisprudence in our public law
E field, Justice Gopal Sri Ram in the recent Ahmad Ibrahim Lecture in relation to *Lim*'s case, ranks it at the lowest ebb in the field of the Malaysian public law. The learned jurist had this to say:

But once a *prima facie* case of an abuse of power is shown, for example that the approval for the construction of a road was given in breach of
F a statute, be it even a penal law, the court is duty bound to make inquiry and apply the appropriate level of intensity of review to determine whether there has been an abuse of power. The failure of the majority judgments in particular the judgment of Salleh Abas LP in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 to recognise this important principle ranks that case as the lowest ebb in the field of Malaysian public
G law. The dissents of Seah and Abdoolcader SCJJ really point the way forward. The way forward therefore lies in applying the highest level of scrutiny whenever a fundamental right is infringed and whenever an abuse of power by reason of unfairness is brought home. But there is a proviso to this. Those entrusted with the judicial power of the state must act according to established principles of constitutional and administrative
H law and not display a propensity that shows them to be – to paraphrase Lord Atkin – more pro-executive than the executive. When that happens, the rule of law dies as does the Constitution itself. (emphasis added.)

The observation of Professor Andrew Harding as well as Justice Gopal Sri Ram, in my view is an understatement. In my view, arguably the decision
I of majority in *Lim*'s case reflects the employment of the jurisprudence of parliamentary supremacy in public law field and in consequence it is not one of the 'lowest ebb' but the decision by the court is tainted with the

jurisprudence relating to illegality, irrationality and procedural impropriety as advocated by Lord Diplock in the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

Arguably, *Lim*'s case exposes judicial disaster in the administration of justice when by the court's decision the court's door to seek issues related to accountability, transparency and good governance which is the soul of rule of law, was more or less closed by advocating *'locus standi'* of the litigant to question the policy of the Government. Professor Andrew Harding was subtle in his observation on the damage done by *Lim*'s decision in public law field in contrast to the former Federal Court Judge, Gopal Sri Ram. To put it bluntly, both the jurists in my view are saying the 'soul' of rule of law is necessary to check excesses by public decision makers to ensure economic success as well as fundamental rights in any democratic nation.

Arguably, the decision in *Lim*'s case in blunt terms has substantially deprived the 'soul' of rule of law and it is now in the hands of jurists to do appropriate research to place back that part of the soul which was lost through *Lim*'s decision to be restored back through the judgment of the court by the employment of constitutional supremacy jurisprudence to enhance justice. The good news is that the judiciary by its recent decision has commenced damage control and it is reflected in the decision of Hasan Lah FCJ in a case which I will deal with shortly where the Chief Justice Arifin Zakaria was also a member of the coram of the Federal Court.

It is disheartening to note that so far there is no research done by jurists or critics to demonstrate the consequence of *Lim*'s judgment which had in actual fact compromised subsequent decisions of the court which had led to the compromise of the concept of transparency, accountability and good governance. This, in my view, has impinged on fundamental rights and justice and rule of law leading to the recent press statement by HRH, Rulers on the rule of law. It is now in the hands of all who are involved in the administration of justice to take steps to correct the shortcomings to sustain rule of law relating to constitutional supremacy and not parliamentary supremacy.

(k) India

It must be noted that the Indian courts at the early part after independence employed the jurisprudence relating to parliamentary supremacy to deal with constitutional issues. This is reflected in at least two decisions, namely: (i) *Shankari Prasad Singh Deo v. Union of India* AIR 1951 SC 458; (ii) *Sajan Singh v. State of Rajasthan* AIR 1965 SC 845. That progress was arrested by the employment of constitutional supremacy jurisprudence, which is reflected in two cases and subsequently followed in a number of other cases. The two important cases are (i) *IC Golaknath v. State of Punjab* AIR 1967 SC 1643; (ii) *Kesavananda Bharathi v. State of Kerala* [1973] 4 SCC 225. These two cases led to the launch of 'basic structure' jurisprudence by the Indian jurists

as well as the judges, a concept which was not in vogue in the commonwealth then. Basic structure jurisprudence, which the court gave force to, was consistent with the oath of office of the judiciary and was done, notwithstanding the fact that the then distinguished, The Right Honourable Prime Minister of India, Jawaharlal Nehru, who was a barrister himself, was of the view that parliamentary supremacy jurisprudence must be employed by the courts. Though the word parliamentary supremacy jurisprudence was not mentioned by the renowned Prime Minister, learned author Dhanapalan (2015) at p. 27 captures what he had said and that part reads as follows:

> Speaking on the Draft Constitution, Jawaharlal Nehru had said in the Constituent Assembly' that the policy of the abolition of big estates is not a new policy but one that was laid down by the National Congress years ago. "So far as we are concerned, we, who are connected with the Congress, shall, naturally give effect to that pledge completely and no legal subtlety, no change, is going to come in our way". He had further stated that within limits, no Judge and no Supreme Court will be allowed to constitute themselves into a third chamber; no Supreme Court or no judiciary will sit in judgment over the sovereign will of the Parliament which represents the will of the entire community; if we go wrong here and there, they can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary must be in the way. According to Jawaharlal Nehru, the ultimatum is that the whole Constitution is a creature of Parliament.

At this juncture, I must say that those who are involved in the study, practice and administration of constitutional and/or administrative law must take note that their research will not be complete if they have not had the opportunity to read the excellent book penned by Justice Dhanapalan, a retired judge of Madras High Court, titled '*Basic Structure Jurisprudence*' which I had mentioned earlier.

I do not wish to set out what basic structure literally means, save to draw attention to what a well-known senior advocate in India and a constitutional law expert, K Parasaran, in his foreword to the book had said; and also the paragraph where Justice Dhanapalan had summarised the concept at p. 30 respectively.

At p. v and vi, learned Senior Advocate Parasaran says:

> The basic structure, *inter alia*, comprehends supremacy of the Constitution, federalism (quasi-federal), democracy, separation of powers, judicial independence comprising of (a adjudicatory independence, (b) institutional independence and judicial review. The basic features are inextricably intertwined forming an integral whole. No basic feature can be disturbed by the exercise of the power of amendment or by exercise of judicial power of interpretation. None of the provisions of the Constitution can be so interpreted as to conflict with any of the basic features of the Constitution. Any amendment made which conflict with any of the basic features of the Constitution will be rendered unconstitutional. When a judgment of the Supreme Court, conflicts with

> any basic feature of the Constitution, the amending power being a constituent power can reverse the said judgment. The 24th Amendment reversed the law declared in *Golaknath* case on the interpretation of Article 13. The validity of the said amendment was upheld in *Kesavananda Bharati* case. It is in contrast to the plenary power of the Parliament. If an Act of Parliament reverses a judgment of court and usurp the judicial power or intermeddle with it by a plenary power, it will be unconstitutional. The invalidity or any defect in the enactment pointed out in the judgment has to be removed, the Act made retrospective and a validating provision inserted, if a judgment is to be neutralised. This principle does not apply to constitutional amendments. The validity of a constitutional amendment can be tested only on the touchstone of basic features.

At p. 30, Justice Dhanapalan says:

> There is no hard and fast rule for determining the basic structure of the Constitution. Different Judges keep different views regarding the theory of basic structure. But, at one point, they have similar view that Parliament has no power to destroy, alter or emasculate the 'basic structure' or 'framework' of the Constitution. If the historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Article 368 are kept in mind, then, there can be no difficulty in determining what are the basic elements of the basic structure of the Constitution. These words apply with greater force to the doctrine of basic structure, because the federal and democratic structure of the Constitution, the separation of powers and the secular character of our State are very much more definite than either negligence or natural justice. So, for the protection of welfare State, fundamental rights, unity and integrity of the nation, sovereign democratic republic and for liberty of thought, expression, belief, faith and worship, independence of judiciary are mandatory. None is above Constitution, including Parliament and Judiciary.

As I said earlier, basic structure jurisprudence which is an Indian make is complex as set adumbrated by K Parasaran as well as Justice Dhanapalan. Constitutional oath jurisprudence which is a Malaysian make is simple but it derives its jurisprudential strength from the Indian decision based on basic structure jurisprudence. That is the distinction, as well as the decision relating to arbitrariness by HRH Raja Azlan Shah in *Sri Lempah* case which I had stated earlier.

(l) Constitutional Oath, Basic Structure Jurisprudence And Evolutionary Constitutional Jurisprudence

Basic Structure Jurisprudence was unique and developed by the Indian jurists and judges to protect the Constitution in particular to sustain fundamental rights and justice. Constitutional oath jurisprudence is one of Malaysian make.

Constitutional oath jurisprudence in gist of it is that the Legislature, Executive and Judiciary have taken an oath of office to preserve, protect and defend the Constitution. In consequence, any arbitrary decision by them

must be struck down to sustain the rule of law. In the Malaysian context HRH also has been vested with constitutional, judicial power to sustain the rule of law and order in the country.

Basic structure jurisprudence cannot be said to have been accepted in Malaysia as majority of the decision relating to core public law issues is addressed through the employment of parliamentary supremacy jurisprudence. However, in the field of administrative law, courts are vigilant in employing the doctrine of constitutional supremacy except when it relates to policy of the Government or relates to legislation or constitutional amendment. In such cases, courts are quick to revert to the jurisprudence relating to parliamentary supremacy.

In my view, Malaysia is going through an evolutionary process in respect of rule of law and the constitution as there are a number of judges who are committed to constitutional supremacy. This is reflected in the minority decision in *Lim*'s case itself. Quite recently, Richard Malanjum CJ Sabah and Sarawak in his decision in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 in support of constitutional supremacy jurisprudence had this to say:

> The amendment which states that 'the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law' should be by no means be read to mean that the doctrine of separation of powers and independence of the Judiciary are now no more the basic features of the Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a Federal Act of Parliament and that the courts are now only to perform mechanically and command or binding of a Federal law.

A major breakthrough to debunk the *locus standi* proposition made in *Lim*'s case was recently laid down by Hasan Lah FCJ in the case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 where the CJ Tun Arifin Zakaria was a member of the coram. The Federal Court through Hasan Lah FCJ had this to say:

> 56. In India, the Indian judicial approach on standing has 'veered towards liberalisation of the *locus standi* as the courts realise that taking a restrictive view on this question will have many grievances unremedied' (see *Principles of Administrative Law*, MP Jain & S N Jain, (6th Ed) at p 1994.

As I have already said, Malaysian jurisprudence on the Constitution is going through an evolutionary process. The Federal Court in *Malaysian Trade Union Congress's* case managed to break the self-imposed restrain by the majority in *Lim*'s case which had employed parliamentary supremacy jurisprudence. Similar restrain was also placed by the Indian judges in the cases of *Shankari Prasad* and *Sarjan Singh*. However, that chain was shattered through the decision of *Golak Nath* and *Kesavananda Bharathi* by the employment of 'basic structure jurisprudence'.

The Malaysian position and the convoluted arguments and decisions are all related to the hybrid jurisprudence courts employ to provide or not to provide the relief. The instant case is a reflection of the problem we are going through and it is no easy task for the court when the jurisprudence relating to rule of law stands nebulous. To be candid, the law and jurisprudence relating to the Constitution, civil law in relation to public law field as well as Shariah Law and the jurisdiction and limitation for Parliament as well as State Legislature to enact are quite straight-forward. However, the decision of the courts may vary. It all depends before which judge or coram the matter has been fixed and what version of the rule of law is going to be applied. The end result is almost predictable in public law field.

Appeals And Grounds

[90] In my view, this case is in actual fact a judicial review of administrative decision and in consequence the nebulous jurisprudence which I have explained earlier can be kept to the bare minimum. The jurisprudence relating to judicial review application in administrative action has been clearly dealt by me in the case of *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors* [2007] 5 MLJ 441, where I have cited all the leading authorities in India, England as well as Malaysia, etc and many more other cases. I do not wish to repeat those principles as in this case the administration order of the Pendaftar Muallaf is a nullity *ab initio* and ought to be set aside as of right for non-compliance of ss. 96 and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004. The Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, through Justice Gopal Sri Ram had this to say:

> As a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside.

[91] *Badiaddin*'s case will equally apply in judicial review matters when dealing with the issue of illegality, irrationality and procedural impropriety. I will explain this further in my judgment and will also show the order of the Syariah Court in which the appellant had named a non-Muslim as a party and obtained an order against a non-Muslim party by misleading the Syariah Court is an abuse of process of the Syariah Court jurisdiction (see s. 50 of the Administration of the Religion of Islam (Perak) 2004] and also in breach of constitutional guarantees relating to procedural fairness to non-Muslims.

[92] The misconduct of the appellant requires the relevant authorities and/or the Syariah Court to move contempt proceedings against the appellant in the Syariah Court to arrest the abuse as well as set aside the order made in excess of jurisdiction. Such abuse by a litigant in Syariah Courts often creates tension between Muslims and non-Muslims when the State has clearly made laws to say the Syariah Court will have no jurisdiction to hear dispute in relation to a non-Muslim and the said provision in actual fact guarantees the constitutional right of non-Muslims by ensuring they are not dragged into Syariah Courts. The abuse of process order obtained by the appellant through the Syariah Court dated 29 September 2009 and the subsequent order obtained by the respondent in the High Court dated 24 April 2009 reads as follows:

Borang MS 28

ENAKMEN TATACARA MAL MAHKAMAH SYARIAH (PERAK) 2004

[Subseksyen 135 (3)]

DI DALAM MAHKAMAH TINGGI SYARIAH PERAK DI IPOH
NEGERI PERAK DARUL RIDZUAN

TUNTUTAN MAL BIL. 08100-028-0050 TAHUN 2009

DI ANTARA

MUHAMMAD RIDUAN BIN ABDULLAH
@ PATMANATHAN A/L KRISHNAN
NO. KP. 690526-08-5987 ... PLAINTIF

DAN

INDIRA GANDHI A/P MUTHO
NO. KP. 750110-08-5002 ... DEFENDAN

DI HADAPAN YANG ARIF
TUAN DRS. ABDUL HALIM AZIZI BIN HJ. ABDUL RAHMAN
HAKIM MAHKAMAH TINGGI SYARIAH PERAK DI IPOH

DALAM MAHKAMAH TERBUKA

PADA 29 SEPTEMBER 2009
BERSAMAAN 10 SYAWAL 1430 HIJRAH

PERINTAH

Tindakan ini diambil setelah mendengar, meneliti dan menimbangkan keterangan Plaintif di hadapan Hakim Mahkamah Tinggi Syariah Perak Di Ipoh dengan kehadiran Plaintif dan Peguam Syarie Plaintif En. Mustafa Kamal bin Hj. Mat Hassan dan tanpa kehadiran Defendan,

MAKA PADA HARI INI DIPERINTAHKAN BAHAWA PLAINTIF (SELAKU BAPA) DIBERI HAK JAGAAN KEKAL TERHADAP KETIGA-TIGA ANAK IAITU:

I. Umu Salamah blnti Muhammad RIduan
(Tevi Darsiny A/P Patmanathan)
Lahir pada 5 Mei 1997 (No. Sijil Kelahiran : AA 70160)

II. Abu Bakar bin Muhammad Riduan
(Karan Dinish A/L Patmanathan)
Lahir pada 12 Oktober 1998 (No. Sijil Kelahiran: A J 27146)

III. Umu Habibah binti Muhammad Riduan
(Prasana Diska A/P Pamanathan)
Lahir pada 8 April 2008 (No. Sijil Kelahiran: BZ 14511)

ADALAH PADA HARI INI DIPERINTAHKAN bahawa Defendan hendaklah mematuhi perintah ini sebagaimana yang diputuskan.

DAN ADALAH PADA HARI INI DIPERINTAHKAN JUGA bahawa perintah ini berkuatkuasa serta merta sehingga ada perintah lain dikeluarkan.

T/T

.....

Hakim/Pendaftar
Mahkamah Tinggi Syariah Perak Darul Ridzuan.

DALAM MAHKAMAH TINGGI MALAYA DI IPOH
SAMAN PEMULA NO.(1) 24-513-2009

Dalam Perkara TEVI DARSINY, KARAN DINISH dan PRASANA DIKSA,kanak-kanak

Dan

Di dalam perkara mengikut Seksyen 2, 3, 5, 12 Akta Penjagaan Kanak-Kanak 1961
(Akta No. 13 Tahun 1961)

Dan

Dalam Perkara Akta Membaharui Undang-Undang Perkahwinan & Penceraian 1976 (Akta .164)

Dan

Dalam Perkara mengenai Kaedah-Kaedah Mahkamah Tinggi 1980

ANTARA

INDIRA GANDHI A/P MUTHO
(K/P: 750116-08-5002) ... PLAINTIF/ PEMOHON

DAN

PATHAMANATHAN A/L KRISHNAN
(K/P: 690526-08-5987)

DAN/ATAU

SESIAPA YANG MEMPUNYAI PENJAGAAN DAN PENGAWASAN KANAK-KANAK PRASANA DIKSA (SIJIL KELAHIRAN NO. K 885353) ... DEFENDAN/ RESPONDEN

DIHADAPAN YANG ARIF TUAN RIDWAN B. IBRAHIM PESURUHJAYA KEHAKIMAN, MAHKAMAH TINGGI IPOH, PADA 24 APRIL 2009 ... DALAM KAMAR

PERINTAH

MENURUT SAMAN PEMULA bertarikh 24 April 2009 (Lampiran 2) DAN SETELAH MEMBACA Afidavit Indira Gandhi a/p Mutho yang diikrarkan pada 24 April 2009 dan difailkan disini (Lampiran 3) DAN SETELAH MENDENGAR En. Augustine Anthony, (Peguamcara bagi pihak Plaintif) bersama-sama dengan En. M. Kula dan Cik D. Lalithaa.

ADALAH DIPERINTAHKAN bahawa hak jagaan sementara (interim custody) dan pemeliharaan dan kawalan anak-anak Tevi Darsiny (P) (Sijil Kelahiran No. AA70160), Karan Dinish (L) (Sijil Kelahiran No. AJ 27146), Prasana Diksa (P) (Sijil Kelahiran No. B214511) diberikan kepada Plaintif sehingga permohonan *inter parte*.

DAN ADALAH DIPERINTAHKAN bahawa Defendan dengan sendiri dan/atau melalui ejennya dan/atau melalui wakilnya dan/atau melalui pekerjanya dilarang memasuki kediaman Pemohon di 39, Lorong 2B, Taman Pertama Ipoh melainkan suatu perintah Mahkamah.

DAN ADALAH JUGA DIPERINTAHKAN bahawa suatu Interim Injuksi melarang Defendan membawa keluar anak-anak Tevi Darsiny (P) (Sijil Kelahiran No. AA70160), Karan Dinish (L) (Sijil Kelahiran No. AJ 27146), Prasana Diksa (P) (Sijil Kelahiran No. B214511) tanpa kebenaran bertulis dari Plaintif Perintah Interim ini adalah sehingga pendengaran *Inter Parte*.

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Plaintif dilantik dan diberi hak interim penjagaan undang-undang (Legal Guardianship) keatas Tevi Darsiny (P) (Sijil Kelahiran No. AA70160),Karan Dinish (L) (Sijil Kelahiran No. AJ 27146), Prasana Diksa (P) (Sijil Kelahiran No. B214511).

DAN ADALAH JUGA SELANJUTNYA DIPERINTAHKAN bahawa Defendan dan/atau sesiapa yang mempunyai penjagaan dan pengawasan kanak-kanak bernama Prasana Diksa dengan serta merta menyerahkan kanak-kanak tersebut kepada Plaintif.

DAN ADALAH AKHIRNYA DIPERINTAHKAN bahawa pihak Polis diarahkan untuk membantu Plaintif untuk melaksanakan perintah Mahkamah Yang Mulia ini sekiranya diperlukan.

Bertarikh 24 April 2009.

T/T
Penolong Kanan Pendaftar
Mahkamah Tinggi,
Ipoh.

[93] The Syariah Court order dated 29 September 2009 was made in excess of jurisdiction of the Syariah Court as it was made against a defendant who was a non-Muslim and s. 50 which I have set out below does not vest the Syariah Court with jurisdiction at all. When orders are made in breach of rule of law and inconsistent with Rukun Negara, it creates hardship. All Malaysians are obliged to follow Rukun Negara strictly to avert distrust and tension and create harmony which was the prime object of Rukun Negara.

[94] Section 50 of the Administration of the Religion of Islam (Perak) 2004 states:

Jurisdiction of Syariah High Court.

(1) A Syariah High Court shall have jurisdiction throughout the State of Perak Darul Ridzuan and shall be presided over by a Syariah High Court Judge.

(2) Notwithstanding subsection (1), the Chief Syariah Judge may sit as a Syariah High Court Judge and preside over such Court.

(3) The Syariah High Court shall:

(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Islamic Family Law (Perak) Enactment 2004 [Enactment No. 6 of 2004] or under any other written law prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor; and

(b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the action or proceedings relate to:

(i) bethoral, marriage, ruju', divorce, annulment of marriage (*fasakh*), nusyuz, or judicial separation (*faraq*) or any other matter relating to the relationship between husband and wife.

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadhanah*) of infants;

(iv) the division of, or claims to, harta sepencarian;

(v) wills or gifts made while in a state of *marad-al-maut*;

(vi) gifts *intervivos*; or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) *wakaf* or *nazr*;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

A (x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death; and

(xii) other matters in respect of which jurisdiction is conferred by any written law.

B **[95]** It is clear from s. 50 that (i) the Syariah Court has no jurisdiction to hear an application by the appellant when he names a non-Muslim as a defendant and/or respondent; (ii) this case has nothing to do with s. 50(3)(x); (iii) this case also has nothing to do with s. 50(3)(xi). Very importantly, all parties to this action must appreciate that s. 50 of the Administration of the C Religion of Islam (Perak) 2004 does not give any jurisdiction to the **Syariah Court to issue certificate relating to conversion** (emphasis added).

[96] In this case, the certificate of conversion was given by Pendaftar Muallaf and the certificate reads as follows:

D JABATAN AGAMA ISLAM NEGERI PERAK DARUL RIDZUAN
TINGKAT 6 KOMPLEKS ISLAM DARUL RIDZUAN
JALAN PANGLIMA BUKIT GANTANG WAHAB
30000 IPOH, PERAK DARUL RIDZUAN

Ruj. Kami : JAPK/UKH/DWH/PENT/03/02/2010
E Tarikh : 26 Zulkaedah 1431 H 62

03 November 2010

Kepada Sesiapa Yang Berkenaan

Tuan,

F **Perakuan Memeluk Islam**

Bahawasanya, pemohon yang berikut telah didaftarkan dalam daftar muallaf:

G

Nama Asal	Nama Islam	Tarikh Islam	No. Rujukan
Patmanathan a/l Krishnan	Muhammad Riduan bin Abdullah	11 Mac 2009	98/2009 - IP (I)
Prasana Diksa a/p Pathamanathan	Umu Habibah binti Muhammad Riduan	2 April 2009	117/2009 - IP (I)
Karan Dinish a/l Pathamanathan	Abu Bakar bin Muhammad Riduan	2 April 2009	118/2009- IP (I)
Tevi Darsiny a/p Patmanathan	Umu Salamah binti Muhammad Riduan	2 April 2009	119/2009- IP (I)

H

I

Saya yang menurut perintah

T.T
(Harith Fadzillah bin Hj Abdul Halim)
Ketua Penolong Pengarah Bahagian Dakwah
b.p Pengarah,
Jabatan Agama Islam
Perak Darul Ridzuan

[97] If the certificate relating to conversion had to be challenged, it has to be done by way of judicial review. It has to be set aside if the order of the Pendaftar Muallaf is a nullity *ab initio* based on *Badiaddin* principle. It can be done by way of judicial review and/or writ or originating summons seeking a declaration to nullify the order. In essence, the primary issues involved here has nothing to do with Syariah Courts or its jurisdiction or constitutional principles as advocated by the parties as well as the learned trial judge. The discussion of Syariah Court and its jurisdiction in this judgment is only to demonstrate the conduct of the appellant who had abused the Syariah process.

[98] Subsequent to obtaining the custody order from the Syariah Court in breach of s. 50, the appellant made an application to the Pendaftar Muallaf Perak in breach of the procedure set out in ss. 96 and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004. I have repeatedly read ss. 96 and 106 and it is my judgment that the application was in breach of the said two sections. That two sections do not permit a third party, in this case, a parent from making application. The application must be done by the person who wants to convert himself to the religion of Islam and must satisfy the requirement of s. 96. If it is a minor, the applicant must be the minor who wants to convert and he must obtain the consent pursuant to s. 106 from parent or guardian. For a valid administrative conversion to take place the application in the instant case must be made by the three children and the parent must consent. There is no provision for a parent to make the application. In addition, the three children must and I repeat must affirm what is often called in Arabic as 'Kalimah Shahadah' which is set out in s. 96. If a person or child has not affirmed the 'Kalimah Shahadah' there is no provision in written law for valid conversion to take place and it is as simple as that.

[99] In the instant case, it is not in dispute that the children have not made the application, have not recited the 'Kalimah Shahadah' or have requested the appellant to give consent to their conversion. In consequence, without administrative compliance of s. 96 and 106, the Registrar of Muallaf could not have issued in law a certificate under s. 101 of the Perak Enactment. The certificate is a nullity *ab initio* and just need to be set aside by a court of competent jurisdiction as advocated by the Federal Court in *Badiaddin*'s case.

[100] The said ss. 96, 106 and 101 of the Administration of the Religion of Islam (Perak) Enactment 2004 reads as follows:

Section 96

Requirement for conversion to the religion of Islam.

(1) The following requirements shall be complied with for a valid conversion of a person to the religion of Islam:

(a) the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith;

(b) at the time of uttering the two clauses of the Affirmation of Faith the person must be aware that they mean "I bear witness that there is no God but Allah and I bear witness that the Prophet Muhammad S.A.W. is the Messenger of Allah"; and

(c) the utterance must be made of the person's own free will.

(2) A person who is incapable of speech may, for the purpose of fulfilling the requirement of paragraph (1)(a), utter the two clauses of the Affirmation of Faith by means of signs that convey the meaning specified in paragraph (i)(b).

Section 101

Certificate of Conversion to the Religion of Islam.

(1) The Registrar shall furnish every person whose conversion to the religion of Islam has been registered a Certificate of Conversion to the Religion of Islam in the prescribed form.

(2) A certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate.

Section 106

Capacity to convert to the religion of Islam.

For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is of mind and:

(a) has attained the age of eighteen years; or (b) if he has not attained the age of eighteen years, his parent or guardian consents in writing to his conversion.

[101] It is my judgment that the certificates issued by the Pendaftar Muallaf Perak is a nullity *ab initio* and the order of the High Court quashing the administrative decision was correct not for the reasons stated by the learned trial judge but strictly within the reasons I have stated in this judgment.

[102] I also do not think it is necessary to deal with the convoluted arguments raised and argued by the parties. The authorities cited by the parties are equally convoluted in jurisprudence and has no direct nexus to the facts of the case.

[103] In my view, Syariah laws in this country are quite straight-forward and does not infringe the rights of non-Muslims in any manner and a just decision can be reached if counsels are sufficiently learned in civil, criminal, constitutional and Syariah law and prepared to balance the rights of the parties and/or judicial principles, not only with the Federal Constitution but also with the Rukun Negara to achieve a just result. Such qualities in knowledge have become a rare breed in Malaysia. That is to say, if a person is an expert in Syariah law only and is not an expert in all fields of law, *vice versa* then his version of jurisprudence will be of suspect. That is dangerous and that disadvantage in knowledge must be corrected. One giant in knowledge in civil and Syariah jurisprudence where judicial notice can be taken is Prof Emeritus Ahmad Ibrahim and such personal with that level of jurisprudence as I said is difficult to find and/or if they are any, they do not engage themselves in disseminating the jurisprudence by writing.

[104] The soul of the Rukun Negara is to uphold the rule of law and respect each other's rights and not to simply take refuge on constitutional arguments alone. Such an attempt will not subscribe to common sense approach. It must not be missed that common sense approach is part of our jurisprudence in sustaining rule of law. Those jurists who do not have sufficient exposure to knowledge and jurisprudence will often place convoluted arguments deeming the sanctity of religious values of Muslims as well as non-Muslims which are protected species under the Federal Constitution. That is not permissible within the parameters of Rukun Negara. To put it in another way, once a person is born and bred as a Muslim or converts to a Muslim, he is expected to live and die as a Muslim unless some concession is provided in the State Syariah legislation. This is a well-known Quranic jurisprudence of the religion of Islam and that was known even before the Constitution was formulated and is also a protected principle under art. 4(1) of the Federal Constitution which has to be read with art. 160 of the Federal Constitution which defines law.

Article 4(1) of the Federal Constitution reads as follows:

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 160 of the Federal Constitution defining law reads as follows:

> "law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;

[105] Islamic Jurisprudence was already in place in Malaysia for more than five centuries and that too even before the British colonised Malaya. The fundamental rights provision in the Federal Constitution does not override this protected principle and those who say otherwise cause only disharmony and hardship to the public and does not subscribe to the

definition of law in art. 160 of the Federal Constitution. In truth, dwelling into hair splitting arguments is unnecessary in a blessed land where bread, butter and honey pour to those who are industrious. Every Malaysian must take a balance approach to maintain social order and that is part of the public role in subscribing to rule of law which I repeat is part of Rukun Negara.

[106] *En passant* to assist the jurisprudence in this area and to arrest convoluted jurisprudence, I will say that all relevant authorities and counsel for litigants must take note that:

(i) article 121(1A) is primarily aimed at born Muslims. In addition, by reading the relevant section of the Perak Enactment (which other States also have) the Syariah Court has only jurisdiction to parties in the litigation who are Muslims, ie, either born Muslims or by conversion.

(ii) when it relates to Syariah issues relating to born Muslims, the case laws are very clear that Syariah Court is the supreme arbiter under art. 121(1A) of the Federal Constitution, unless the exception applies. If the subject-matter is not within the Syariah Court but Syariah principles are involved, the civil courts are the sole arbiter under the Federal Constitution. For example, islamic banking matter, probate and administration matter, etc. In addition, if a Syariah Enactment itself has to be challenged, it has to be done through the civil courts. Only civil courts presently have the ability to deal with judicial review of (i) executive decision; (ii) legislation; (iii) constitutional amendment (iv) policy decision. The jurisprudence relating to judicial review as practiced in Malaysia is unknown under the Syariah jurisprudence. Syariah jurisprudence may have its own methodology of judicial review but it is not part of our rule of law. Just arguing for the sake of argument that Syariah Court can deal with judicial review and/or all issues relating to Federal Constitution is not a knowledge based argument and it does not subscribe to rule of law.

(iii) the jurisprudential problem in Syariah personal law of Muslim arises by virtue of case laws and is one not related to born Muslims but converts or purported converts etc; who do not follow strict guidelines enacted in State Laws relating to Muslims and/or who do not want to subscribe to the sanctity of Islam and/or good values of Islam. It is also because the relevant authorities are not being vigilant enough to ensure rule of law is maintained in the country and/or failing to appreciate the rule of law as well as Rukun Negara which states: (a) belief in god; (b) loyalty to King and country; (c) Supremacy of the Constitution; (d) rule of law; (d) courtesy and morality. (Emphasis added). For example, in this case, if rule of law and Rukun Negara have been observed, the appellant would have been penalised for

making an application in the Syariah Court, naming a non-Muslim as the defendant. Further, if the Pendaftar Muallaf has appreciated the Rule of Law and Rukun Negara, he will not have issued the certificate when very importantly the three children have not affirmed the 'Kalimah Shahadah'.

(iv) in addition, I must say that art. 12(3) and 12(4) of the Federal Constitution has nothing to do with conversion. It only permits a parent or guardian from deciding the religion of the child for purpose of worship of a religion other than his own. That article does not help the appellant at all. It has nothing to do with conversion. The difference is not like an apple and an orange but that of marble and pumpkin. In addition, it will not apply to a child who has not affirmed the 'Kalimah Shahadah'; and it cannot apply to infant at all. Only upon affirmation of the 'Kalimah Shahadah' the child can be converted. Selecting the religion does not mean the child has been converted. Case laws which have not made out the distinction will be of no assistance save to say it has to be corrected by due process of law.

Article 12(3) and (4) of the Federal Constitution reads as follows:

> (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
>
> (4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

(v) all parties must take note that the Constitution gives ample protection to freedom of religion. That is not an issue but it cannot be abused by literal interpretation of the Constitution without reading into it the Rukun Negara and also without applying the common sense approach advocated by Lord Denning which I have dealt with in a number of judgments. The State laws relating to religion applies to all Muslims. Whether born Muslims or converts. Once a person is a born and bred as a Muslim or becomes lawfully as a convert, he is expected to respect the sanctity of the religion. The law here as well as the Rukun Negara does not allow a Muslim to hide behind constitutional provision to say he has freedom to choose the religion. However, constitutional framework and Rukun Negara will assist all Muslims if the State laws are unconstitutional and/or impinges on the rights of a Muslim or creates hardship to a Muslim when a Muslim's Syariah personal law as advocated by the Sunni sect namely Hanafi, Shafie, Hambali or Maliki does not require the Muslim to go through such hardship. State laws for Muslims which does not confirm to the Sunni sect can always be challenged and it is provided for in all State Syariah legislation. I have dealt with it in the case of *Yong Fuat Meng v. Chin*

Yoon Kew [2008] 5 CLJ 705; [2008] 5 MLJ 226 and I do not wish to repeat. Such issues, if any, have to be corrected by way of judicial review of legislation whether enacted by Parliament or State Assembly.

(vi) it is also for the appellant in this case, to take note that the Qur'an ordains that the appellant sorts out his obligations. In *Yong Fuat Meng v. Chin Yoon Kew* [2008] 5 CLJ 705; [2008] 5 MLJ 226, on this issue I have made the following observation:

> Islamic Jurisprudence has never been an obstacle for Muslims to fulfil legal requirement and/or equitable or ethical requirement of the law of the country or for that matter, for the purpose of civil law of marriage the contractual commitment of the convert. [See Al-Quran (al-Maida: 1); (al- Nisaa: 59)]

(vii) it is well settled and also upheld by the provision of similar section such as s. 50(3)(b) in all State Syariah legislation that if the issue that is to be decided involves a Muslim and a non-Muslim, the jurisdiction does not lie with the Syariah Court and common sense will dictate that it has to fall under the civil courts and convoluted jurisprudence does not help. If some comfort need to be given to litigants in hybrid cases, it does not stop the CJ from directing special courts to hear Syariah matters between Muslims and non-Muslims with judges conversant in both the laws. It also does not stop the CJ from liaising with the Attorney General to amend the Courts of Judicature Act to allow the Chief Syariah Judge of the State or his representative to sit in civil courts with two other judges, one a Muslim and another a non-Muslim to reach a decision. I must say, such a situation will only arise when the person is a convert and not a born and bred as a Muslim. Such cases in a year are handful only but presently it violently shakes the civil as well as Syariah Courts Administration of Justice in terms of public perception and confidence, and also causes disharmony. For litigants who are born Muslims, it is without doubt that the Syariah Court has the sole jurisdiction in this country. However, it will not be wrong in jurisprudence to obtain the consent of constitutional functionaries to have one court based on the Federal system, to deal with matters relating to converts and non-Muslims to arrest the nation's woes in this area of jurisprudence. This case and the publicity in media will stand as a witness to the woes.

(viii) a simple methodology as suggested above will promote racial harmony and respect for the Government and Government agencies as well as provide satisfaction for litigant in the administration of justice in Malaysia and is a recipe to avoid adverse global and/or public perception.

[107] For reasons stated above, I will dismiss all the appeals with costs to the respondent, with a note that my learned brother Balia Yusof bin Haji Wahi JCA and sister Badariah binti Sahamid JCA by majority had allowed the appeals with no order as to costs.

I hereby order so.